Supreme Court, U.S.
FILED
96 514 SEP 30 1996.
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

DANIEL YAWCZAK,

Petitioner,

vs.

RUDI ACOSTA AND ALMA ACOSTA,

Respondents.

Petition For Writ Of Certiorari To The United States Circuit Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LOUISE H. RENNE
San Francisco City Attorney
PATRICK J. MAHONEY
Chief Trial Deputy - *Counsel of Record*
KIMON MANOLIUS
Deputy City Attorney - Of Counsel
San Francisco City Attorney's Office
1390 Market Street, 6th Floor
San Francisco, California 94102
(415) 554-3935

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

82 pp

I. QUESTIONS PRESENTED

1. For purposes of qualified immunity, is the law clearly established that a police officer may not fire his weapon in self-defense when the officer: (a) has identified himself emphatically and repeatedly as a police officer; (b) is standing directly and immediately in front of a car containing fleeing felons; (c) has his gun drawn and pointed at the car's driver; (d) has ordered repeatedly the occupants of the car to freeze; (e) hears the felons urge the driver to hurry away; (f) sees the driver put the car into gear; and (g) in the next instant sees the car move forward toward him?

2. Could a reasonable officer have believed even if mistakenly that the use of deadly force was necessary, appropriate and lawful under those circumstances?

3. Has this Court mandated a separate inquiry for qualified immunity in excessive force cases, or does a finding that a police officer used excessive force conclusively determine the question of qualified immunity against the police officer?

4. Does a jury's verdict of excessive force against a police officer eliminate the qualified immunity defense where the jury was not instructed on qualified immunity, was not asked to answer special interrogatories as a factual predicate to the qualified immunity inquiry, and was not asked whether qualified immunity should extend to the police officer?

5. Does fairness require a new trial where the district court judge, who throughout trial indicated that the

I. QUESTIONS PRESENTED – Continued

court would decide qualified immunity, grants a police officer's post-trial motions for entry of judgment and for qualified immunity but does not rule on the officer's new trial motion, and where the appellate court reverses these rulings but denies the new trial motion based on the jury's verdict when the jury never heard arguments or was instructed on the law of qualified immunity?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel Yawczak, an Inspector with the San Francisco Police Department, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding.

II. OPINIONS BELOW

The May 17, 1996 decision of the United States Court of Appeals for the Ninth Circuit, as amended on June 18, 1996, is reprinted in Appendix ("App.") A to this Petition. App. A, pp. 1-20. That decision also is reported as *Acosta v. City and County of San Francisco*, 83 F.3d 1143 (9th Cir. 1996). In that decision, the Ninth Circuit reversed the district court's order granting Appellee Yawczak's motion for qualified immunity and for directed verdict.

On June 17, 1994, the Honorable Samuel Conti of the United States District Court for the Northern District of California issued an order granting Defendant Yawczak's motion for qualified immunity and for directed verdict, but failing to rule on Yawczak's new trial motion. That unpublished order, filed on June 21, 1994, is reprinted in Appendix B to this Petition. App. B, pp. 1-12.

The June 26, 1996 order of the Ninth Circuit denying Yawczak's motion to file a supplemental letter brief in connection with his petition for rehearing and rehearing *en banc* is reprinted in Appendix C to this Petition. App. C, p. 10.

The July 2, 1996 order of the Ninth Circuit denying Yawczak's petition for rehearing and rehearing *en banc* is reprinted in Appendix D to this Petition. App. D, p. 1.

III. JURISDICTION

Respondents Rudi Acosta, both as an individual and as executor of the estate of Michael Acosta, and Alma Acosta, brought this suit against San Francisco Police Inspector Daniel Yawczak.[1] The complaint sought relief under 42 U.S.C. § 1983.[2] The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1343.

On the Acostas' appeal, the Ninth Circuit had appellate jurisdiction under 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides in pertinent part as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

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[1] The Acostas also sued the City and County of San Francisco but the issue of municipal liability was bifurcated well before trial.

[2] The Acostas brought state claims, but they dismissed these claims during trial.

> probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Title 42, § 1983 of the United States Code provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . , subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

V. STATEMENT OF THE CASE

A. Factual Background

San Francisco Police Inspector Daniel Yawczak walked out of his San Francisco apartment shortly before 7:00 p.m. on November 2, 1991. 108 Clerk's Record ("CR") 403:18-24; 404:10-17; 405:6-11. He was off-duty but carrying his service revolver. 106 CR 123:6-17; 108 CR 402:20-403:3. As Yawczak walked to his car, he heard a woman scream "Help!" and "Police." He saw two men, Ernesto Pecson and Edwin Silva, running past him. 106 CR 133:4-16; 108 CR 405:6-22. One of the men was carrying a purse. 106 CR 127:16-20.

Yawczak began chasing the men, yelling at them to "Freeze." He identified himself as a police officer as he ran. 108 CR 406:23-407:10; 109 CR 602:11-18. Because he was off-duty, Yawczak did not have a radio with which to call for assistance. 106 CR 123:9-11; 128:9-13; 147:8-15; 108 CR 415:8-16. In San Francisco, police officers have a duty

to apprehend criminals, even when off-duty. 106 CR 123:12-17; 108 CR 410:11-25; 442:6-443:13.

The two men failed to heed Yawczak's orders. 108 CR 407:7-16; 109 CR 602:11-17. They ran to the corner and turned right. 108 CR 406:19-22. They ran past a double-parked car halfway up the residential block, then looped back and into the car from the passenger's side door. 106 CR 59:22-60:1; 107 CR 256:16-20; 108 CR 407:11-408:1; 419:2-11. Michael Acosta, their accomplice, was waiting behind the wheel of the vehicle. Acosta had an alcohol level of between .06 and .08, enough to impair his judgment. 106 CR 90:9-91:20; 93:1-94:20.

Yawczak reached the front of the car just as the two men got into the car. 108 CR 412:14-413:14. Standing directly and immediately in front of the car, Yawczak again identified himself as a police officer and ordered the men not to move in no uncertain terms. 106 CR 150:5-15; 108 CR 408:2-4; 109 CR 597:16-598:4. Both of the men inside the car said "Go! Hurry up!" to Acosta when they got into the car. 107 CR 230:11-231:1; 108 CR 408:5-9; 109 CR 598:23-599:3. Yawczak next saw Acosta put the car into gear. 1 CR ¶ 12; 108 CR 408:5-9.

The most important fact in this case is that the car moved prior to Yawczak firing his weapon. Three witnesses testified that, before Yawczak fired his weapon, the car moved toward him: Yawczak, 108 CR 408:2-17; Pecson, who was one of the robbers in the car next to Acosta, 109 CR 600:4-14; 606:17-18; and, John Moragne, a witness in an apartment overlooking the scene. 109 CR 571:16-18; 572:6-19. The Acostas admitted in their complaint that Acosta had put the car into gear and moved

the car forward before Yawczak shot. 1 CR ¶ 12. That portion of the complaint was read to the jury. 109 CR 576:16-577:9. Other witnesses were not in a position to observe whether or not the car moved prior to Yawczak's shot. App. A, p. 11 n. 7; App. B, pp. 9-11.

Fearing for his life, Yawczak shot the driver of the car as the car came at him. The car struck Yawczak and sped away. App. B, p. 11.

B. Procedural Background

1. Proceedings in the district court

Plaintiffs Rudi and Alma Acosta, parents of Michael Acosta, brought causes of action against Yawczak under 42 U.S.C. § 1983 and California state law. 1 CR. Trial began on May 3, 1994. During trial, the Acostas dismissed their state claims. 109 CR 549:5-550:5.

After plaintiffs rested, Yawczak moved for judgment as a matter of law on the merits and on qualified immunity. 38 CR; 108 CR 384:18-25. Judge Conti took the motions under submission. 84 CR; 108 CR 385:6-9. At the close of the evidence, Yawczak renewed his motions. The district court again took the motions under submission. 88 CR; 109 CR 557: 6-18.

After the jury returned a verdict for the Acostas, Yawczak orally renewed his motions. 110 CR 702:19-703:7. He then submitted further briefing, and added an alternative motion for a new trial. 95 CR. The district court granted the motion for judgment as a matter of law based upon insufficient evidence of unreasonable force by Yawczak. App. B. Judge Conti also granted

Yawczak's motion for qualified immunity. *Id.* The court failed to rule on Yawczak's motion for new trial. App. A, p. 17; App. B; 98 CR.

On June 21, 1994, judgment was entered in favor of all defendants. 99 CR. The Acostas made no post-trial motions.

2. Proceedings in the Ninth Circuit

On July 19, 1994, the Acostas filed a timely appeal. On May 17, 1996, the Ninth Circuit reversed the district court's rulings on Yawczak's motions. App. A. The panel also denied Yawczak's alternative motion for a new trial. *Id.*, pp. 17-19.

On May 31, 1996, Yawczak filed a petition for rehearing and rehearing *en banc*. On June 6, 1996 in conjunction with that petition, Yawczak submitted a supplemental letter brief alerting the *Acosta* panel to the May 28, 1996 Ninth Circuit decision in *Reynolds v. County of San Diego*, 84 F.3d 1162 (9th Cir. 1996) which was in direct conflict with the *Acosta* decision. App. C, pp. 1-5. While *Acosta* held that the analyses on the merits and for qualified immunity were one and the same, the *Reynolds* panel correctly employed the test set out by this Court in *Anderson v. Creighton* and *Mitchell v. Forsyth*. *Id.*

After learning that the letter brief would not be accepted absent a motion, Yawczak moved on June 21, 1996 for leave to file the supplemental brief. App. C, pp. 6-7. Yawczak also submitted the *Reynolds* decision as a supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j) on the same day. *Id.*, pp. 8-9. In

the interim, the *Acosta* panel amended its opinion by deleting language and citations explicitly holding that the analyses for qualified immunity and liability in excessive force cases are one and the same. App. A, p. 5. The implicit reasoning in the opinion, however, did not change with the June 18, 1996 amendment. *Id.*, pp. 13-17. On July 2, 1996, the Ninth Circuit denied Yawczak's petition for rehearing and rehearing *en banc*. App. D, p. 1.

VI. REASONS FOR GRANTING THIS WRIT

The *Acosta* panel utterly failed to follow this Court's prior decisions on qualified immunity. Instead, the panel equated the analysis for qualified immunity with the analysis for liability under the Fourth Amendment thereby eviscerating the immunity doctrine in excessive force cases. The Ninth Circuit also erred in holding that the jury's verdict against Yawczak on the excessive force question determined the qualified immunity question. Finally, the *Acosta* panel unfairly denied Yawczak's new trial motion based on the jury's verdict where Yawczak never had an opportunity to present his qualified immunity defense to the jury.

A. Certiorari should be granted on the issue of whether Officer Yawczak is entitled to qualified immunity because the *Acosta* panel failed to follow this Court's binding precedent.

It cannot be disputed that government officials are entitled to qualified immunity so "long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v.*

Creighton, 483 U.S. 636, 638 (1987). Whether the immunity applies "turns on the 'objective legal reasonableness' of the action" by the official. *Id.* at 639 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). This determination requires an objective evaluation of the official's conduct in light of the information possessed at the time of the incident. *Anderson*, 483 U.S. at 641. "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (*quoting Malley v. Briggs*, 475 U.S. 335, 341-3 (1986)).

The *Acosta* panel correctly noted that "[d]etermining whether a law enforcement officer is entitled to qualified immunity involves consideration of two factors: '1) Was the law governing the officer's conduct clearly established? 2) Under that law, could a reasonable officer have believed that his conduct was lawful?' " App. A, p. 13; 83 F.3d at 1147 (*quoting Sinaloa Lake Owners Assoc. v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995) (*quoting Act Up!/Portland*, 988 F.2d 868, 871 (9th Cir. 1993)). The *Acosta* panel, however, then ignored the law applicable to each of these factors. First, this Ninth Circuit panel wrongly identified the relevant clearly established law. Second, the *Acosta* panel equated the analysis for qualified immunity with that for liability on the merits. As a consequence, the *Acosta* court has eviscerated completely the doctrine of qualified immunity in excessive force cases unless reversed by this Court.

1. The Ninth Circuit erred in identifying the relevant clearly established law for purposes of qualified immunity.

The Ninth Circuit provided the following as the "clearly established law" relevant to this case: "An officer's use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' " App. A., p. 14; 83 F.3d at 1147 (*citing Scott v. Henrich*, 39 F.3d 912, 914 (1994)). The law, however, was established with far greater precision.

Yawczak could fire his weapon if he believed he was in serious danger, and the car coming at him presented that threat of serious harm. *See Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985); *United States v. Sanchez*, 914 F.2d 1355, 1357-58 (9th Cir. 1990), *cert. denied*, 499 U.S. 978 (1991); *United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987), *cert. denied*, 484 U.S. 1077 (1988). The law was clearly established that Yawczak, standing directly and immediately in front of a stationary vehicle, could fire at the driver of the vehicle when it moved toward him.

Other cases confirm this standard. For example, in *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993), an off-duty, plainclothes police officer saw a reckless driver. In an attempt to apprehend the driver, the off-duty officer ran toward the vehicle with his service revolver drawn. The officer yelled, "Police Officer, stop! Turn the vehicle off!" While the officer was in front of the vehicle, the vehicle moved forward toward the officer. The officer fired a shot into the window. His gun accidentally discharged a second time. Both shots hit the driver. *Id.* at 776. The Fourth

Circuit affirmed the district court's grant of immunity to the officer.

Similarly, in *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992), the Court granted qualified immunity to a police officer who fired at a pick-up truck that was coming at him. *Accord Estate of Starks v. Enyart*, 5 F.3d 230, 233-34 (7th Cir. 1993); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.), *cert. denied*, 504 U.S. 915 (1992).

The *Acosta* panel therefore erred by using only a generalized notion of the clearly established law because the law was clearly established in Yawczak's favor.

2. Certiorari must be granted to correct the *Acosta* court's equating the analyses on the merits with that for qualified immunity in excessive force cases.

At the outset of its discussion on qualified immunity, the Ninth Circuit identified the appropriate and distinct standard, namely: "*could* a reasonable officer have believed that his conduct was lawful?' " App. A, p. 13; 83 F.3d at 1147 (citations omitted) (emphasis added). In its analysis, however, the Court failed to utilize the standard it correctly identified. Instead, the Court equated the qualified immunity analysis with the excessive force

standard under the Fourth Amendment.[3] Moreover, the panel erred in holding that the jury's verdict against Officer Yawczak on the excessive force question precluded his defense of qualified immunity.

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[3] Initially, in its opinion filed May 17, 1996, the Ninth Circuit explicitly held that the analyses are the same:

> Our holding is consistent with our prior decisions in which we concluded that "[i]n Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits." *Scott v. Henrich*, 39 F.3d at 914 (internal quotation marks and citation omitted). *See, e.g., Morgan v. Woessner*, 997 F.2d 1244, 1260 (9th Cir. 1993), *cert. dismissed, Serle v. Morgan*, 114 S.Ct. 671 (1994); *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992). That surely is true in this case.

App. A, pp. 5-6. After Yawczak filed his petition for rehearing and rehearing *en banc* on May 31, 1996 in which he challenged the panel's equating the immunity and liability analyses, the panel deleted the above-quoted language. *Id.* The panel's reasoning, however, did not change. It concluded that Yawczak was not entitled to qualified immunity because the jury had found him liable for the use of excessive force. App. A, pp. 13-17; 83 F.3d at 1147-9.

Not only is the *Acosta* panel's reasoning contrary to the teaching of this Court (*see infra*), it also conflicts the teaching of the Ninth Circuit as a whole. In *Hammer v. Gross*, 932 F.2d 842, 850 (9th Cir.) (*en banc*), *cert. denied*, 502 U.S. 980 (1991), the Ninth Circuit flatly rejected the *Acosta* argument: "To accept [the] contention would be to eliminate all possibility of immunity for violations of the Fourth Amendment, an unacceptable outcome." *Id.* (*citing Anderson*, 483 U.S. at 643).

a. This Court has held expressly that the analyses for the reasonableness of the use of force and the entitlement to qualified immunity are separate and distinct.

The Ninth Circuit concluded that the jury's verdict on the excessive force question necessarily precluded qualified immunity. This approach has been rejected by this Court on numerous occasions.

The appropriate question on qualified immunity is not whether the officer used "reasonable force." Rather, qualified immunity is broader: the question is whether a reasonable officer *could believe* the defendant officer's conduct was lawful, *even if* a court or jury decides that the conduct was not. *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) ("The decisive fact is not that the officer's position turned out to be incorrect, but that the question was open at the time he acted").

In denying Yawczak qualified immunity, the Ninth Circuit ignored the express teaching of *Hunter v. Bryant*, 502 U.S. at 228, and *Malley v. Briggs*, 475 U.S. at 341-343, that mistaken judgments by reasonable officers are not subject to challenge. The *Acosta* approach is fundamentally wrong because police work includes many situations where the precise degree of appropriate force in a given situation is not clear. *Anderson*, 483 U.S. at 644 ("We have frequently observed, and our many cases on the point amply demonstrate, the difficulty in determining whether particular searches or seizures comport with the Fourth Amendment"). When decisions are close to the line dividing reasonable from unreasonable force, this Court has

directed that the decision maker is entitled to qualified immunity: if "officers of reasonable competence could disagree on the issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In fact, in *Anderson*, this Court *expressly* rejected the *Acosta* panel's approach of equating the analysis of the reasonableness of Fourth Amendment searches and seizures with that for qualified immunity:

> First, and most broadly, the [appellants] argue that it is inappropriate to give officials alleged to have violated the Fourth Amendment – and thus necessarily to have *unreasonably* searched or seized – the protection of qualified immunity intended only to protect reasonable official action. It is not possible, that is, to say that one "reasonably" acted unreasonably. *The short answer to this argument is that is is foreclosed by the fact that we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment.* Even if this were not so, however, we would still find the argument unpersuasive. Its surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term, such as "undue" searches and seizures been employed, what might be termed the "reasonably unreasonable" argument against application of *Harlow* to the Fourth Amendment would not be available – just as it would be available against application of *Harlow* to the Fifth Amendment if the term "reasonable process of law" had been employed there.

Id. at 644 (short emphasis in original, long emphasis added, citations omitted).

In equating the analyses for excessive force and qualified immunity, the *Acosta* panel ignored this binding precedent. In fact, there is no mention in the panel's decision of any Supreme Court case dealing with qualified immunity.

b. Certiorari must be granted as the Ninth Circuit erred in determining that the jury's verdict against Yawczak on the excessive force claim foreclosed his entitlement to qualified immunity.

Contrary to the Ninth Circuit's holding, the jury's verdict on the excessive force claim did not answer the question of Yawczak's entitlement to qualified immunity.

i. The jury decided only that Yawczak used excessive force.

The jury was instructed to assess "the reasonableness of the force used by Yawczak according to the excessive force standard articulated by the Supreme Court in *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)." App. A, pp. 7-8 n. 3; 83 F.3d at 1145. The jury answered a single question in reaching its decision:

> Q. Did Daniel Yawczak violate Michael Acosta's constitutional rights by using excessive force against him?
>
> A. Yes.

The jury was not instructed on the law of qualified immunity, was not given special interrogatories to answer as part of the factual predicate to a decision on qualified immunity, nor was it asked whether qualified immunity should extend to Yawczak.[4] As a consequence, defense counsel did not and could not argue to the jury the defense of qualified immunity.

Contrary to the *Acosta* panel's decision, there was nothing implicit in the jury's verdict that answers the qualified immunity question. In a classic example of Monday morning quarterbacking, the *Acosta* court extrapolated from the jury's verdict. There simply is no support for the contention that "[i]f the jury found that the force used by Yawczak was excessive, it necessarily found that Acosta was not driving the vehicle at him at a high rate of speed." App. A, pp. 15-16; 83 F.3d at 1148. There was no evidence to support such a finding and no justification for the Ninth Circuit's refusal to extend qualified immunity to Yawczak based solely on the jury's verdict.

ii. A reasonable officer could have believed that his life was in danger and that the use of deadly force was justified.

The *Acosta* Court conceded that, based on the evidence presented, the jury likely concluded that the car in front of which Yawczak stood began moving forward. It

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[4] Yawczak submitted special interrogatories for the jury on certain foundational facts for the district court's use in deciding the issue of qualified immunity. The district court refused to submit the qualified immunity issue to the jury.

was undisputed that Yawczak identified himself as a police officer and ordered the car's occupants to freeze as he stood in front of the car. Yawczak's gun was drawn, pointed at the driver of the car. He saw the driver put the car into gear. The only relevant question on qualified immunity is: *could* a reasonable officer have believed that his life was in danger when the car moved forward toward him? The answer has to be yes.

Indeed, *Acosta* holds that *no reasonable officer* in Yawczak's position could have believed that the use of force was appropriate when the car moved forward. This decision cannot stand for several reasons.

First, the Ninth Circuit violated this Court's oft stated rule that a police officer's actions must be judged without the benefit of "the 20/20 vision of hindsight" and with the realization that police officers "are often forced to make split-second judgments" in "tense, uncertain, and rapidly evolving" circumstances. *See, e.g., Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Instead, *Acosta* would require that Yawczak make a determination as to whether he had time, based on the speed and acceleration of the vehicle, to jump out of the path of the oncoming car.[5]

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[5] Without citation to the record, the *Acosta* panel alluded to "an expert witness" who testified that an officer in Yawczak's position "would have had ample opportunity to move out of the way of the vehicle without suffering serious bodily harm, given the evidence regarding Yawczak's location, the car's location, and the nature of the car's movement." App. A, p. 12 n. 8; 83 F.3d at 1147 n.8. *No witness at trial provided such testimony.* Even had there been such a witness, however, the Ninth Circuit held on May 28, 1996 that the fact that an expert disagrees with a police officer's actions does not raise a genuine issue of material

Even if the car had only begun to move forward, and was going slowly, in the split second Yawczak had to determine whether he was being threatened with great injury, it was reasonable for him to believe that he was.[6]

Second, the panel ignored that Yawczak was entitled to qualified immunity *even if he were mistaken* about the driver's intentions when the car moved forward, or the speed at which the car was moving or accelerating. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). While the jury found that the force he used was excessive, there is no

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fact as to the reasonableness of the officer's actions. *Reynolds v. County of San Diego*, 84 F.3d 1162, 1170 (9th Cir. 1996).

[6] The Circuit Courts rightly have followed the Supreme Court's admonition that a police officer's decision must be judged from the perspective of a reasonable officer on the scene and not in hindsight. For example, in *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991), a police officer repeatedly demanded that a man in a car put his hands up. The man did not comply. When the man, who had something in his hands, began to turn toward the officer, the officer shot him. It was later discovered that the man was holding a beer bottle. *Id.* at 215. The court granted qualified immunity because a reasonable officer could have believed that the man posed a deadly threat. *Id.* at 216-217; *see also Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988) ("[A]ppellate judges would be well-advised not to second guess an officer's split second reasonable judgment to protect himself"); *Young v. City of Killeen, Tex.*, 775 F.2d 1349, 1353 (5th Cir.) ("If Young's movements gave [the officer] cause to believe that there was a threat of serious physical harm, [the officer's] use of deadly force was not a constitutional violation"), *rehearing denied*, 778 F.2d 790 (5th Cir. 1985).

showing that at least one other reasonable officer mistakenly could have believed that his life was being threatened. If Yawczak made a mistake, his mistake does not abrogate his immunity. *Id.*

Finally, the Ninth Circuit's position is untenable in the real life world of split-second life and death decisions. The effect of the *Acosta* holding is to require that an officer standing in front of a vehicle driven by fleeing felons first assess the vehicle's speed and acceleration, and if he or she can evade the car, the officer must do so without discharging a weapon.[7] If the officer fires the weapon but in hindsight it is determined that he or she could have evaded the car, the officer is liable. Simply put, this decision requires that every police officer jump out of the way of the car, no matter what its speed or acceleration.

Moreover, in reaching its decision, the Ninth Circuit necessarily holds that a police officer has a duty to retreat from fleeing felons. This is not the law. *See e.g., Graham v. Connor,* 490 U.S. at 396. Nor must an officer choose the "least intrusive alternative" in using force to effect an arrest. *Forrester v. City of San Diego,* 25 F.3d 804, 808 (9th Cir. 1994), *cert. denied,* 115 S.Ct. 1104 (1995).

The *Acosta* panel agreed that the record demonstrates that the car moved prior to Yawczak's shot. So long as that is true, Yawczak is entitled to qualified immunity.

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[7] Of course, if the officer is incorrect as to his or her ability to evade the car, the officer loses his or her life or is seriously injured.

B. Certiorari must be granted to resolve the conflict in the Ninth Circuit as to the proper analysis for qualified immunity in excessive force cases

There are two distinct lines of authority in the Ninth Circuit regarding the proper analysis for qualified immunity in excessive force cases. In numerous cases, the Ninth Circuit has followed *Anderson v. Creighton* and *Mitchell v. Forsyth* and determined correctly that the analyses for qualified immunity and on the merits are distinct and separate. *See, e.g., Reynolds v. County of San Diego*, 84 F.3d 1162, 1166 (9th Cir. 1996). In others, however, the Ninth Circuit has wrongly equated the analyses as in *Acosta*.

Yawczak filed his petition for rehearing and rehearing *en banc* requesting that the Ninth Circuit reconcile these two lines of authority. His petitions were denied. The Ninth Circuit has been unwilling or unable to reconcile its own decisions. It has placed police officers in an untenable position by failing to provide clear and correct guidance to both district court judges and litigants.

1. The Court's decision is inconsistent with its prior decisions which require separate analyses for qualified immunity and the merits.

There are numerous prior decisions in the Ninth Circuit which follow *Anderson v. Creighton's* requirement of two separate and distinct analyses for the liability and immunity questions. The *Acosta* panel, however, failed to even acknowledge these decisions in holding that the analyses are the same.

For example, in *Hammer v. Gross*, 932 F.2d 842, 850 (9th Cir.) (*en banc*), *cert. denied*, 502 U.S. 980 (1991), the Ninth Circuit expressly held that the analyses are distinct: "To accept [that the immunity and liability analyses are the same] would be to eliminate all possibility of immunity for violations of the Fourth Amendment, an unacceptable outcome." *See also Floyd v. Laws*, 929 F.2d 1390, 1393-4 (9th Cir. 1991) (noting the existence of distinct analyses for liability and qualified immunity determinations); *Thorsted v. Kelly*, 858 F.2d 571, 574-575 (9th Cir. 1988); *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986) (affirming summary judgment on qualified immunity where the "deputies could have reasonably believed that the force they used to subdue [the plaintiff] was necessary for their immediate safety"). Similarly, in *Chew v. Gates*, 27 F.3d 1432, 1443, 1450 (9th Cir. 1994), *cert. denied, City of Los Angeles v. Chew*, 115 S.Ct. 1097 (1995), the Ninth Circuit affirmed the lower court's decision granting qualified immunity to individual defendants while finding the excessive force inquiry as to the municipal defendant should go to the jury.[8]

More recently, on May 28, 1996, just eleven days after the *Acosta* panel's May 17, 1996 opinion, another Ninth Circuit panel decided *Reynolds v. County of San Diego*, 84 F.3d 1162 (9th Cir. 1996).[9] The *Reynolds* panel affirmed a

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[8] Other circuits are in accord. *See, e.g. Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994); *Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992); *Slattery v. Rizzo*, 939 F.2d 213, 215 (4th Cir. 1991).

[9] After filing his petition for rehearing and rehearing *en banc* in the Ninth Circuit on May 31, 1996, Yawczak submitted a

district court's order granting an officer's summary judgment motion for qualified immunity in an excessive force death case. Specifically, the *Reynolds* Court cited Supreme Court authority and correctly determined that the qualified immunity analysis is distinct from that on the merits under the Fourth Amendment. 84 F.3d at 1166-7. *Reynolds*, filed May 28, 1996, is in direct conflict with the *Acosta* decision.

The *Reynolds* panel correctly relied on prior Ninth Circuit cases which held or recognized that the analysis of qualified immunity is not the same as that for liability under the Fourth Amendment in excessive force cases: the qualified immunity standard "provides that *'regardless of whether the constitutional violation occurred*, the officer should prevail if the right asserted by the appellant was "not clearly established" or the officer could have reasonably believed that his particular conduct was lawful.' " *Id.* at 1167 (citations and quotations omitted) (emphasis added). Obviously, if a violation had occurred and the analyses on qualified immunity and the excessive force issue are the same, there can be no qualified immunity.

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letter brief on June 6, 1996 alerting the *Acosta* panel to the *Reynolds* decision. App. C, pp. 1-5. After learning that his letter brief was not properly before the Court absent a motion, Yawczak moved on June 21, 1996 for permission to file the June 6, 1996 letter brief. *Id.*, pp. 6-7. In addition, Yawczak submitted the *Reynolds* decision as an additional citation pursuant to Federal Rule of Appellate Procedure 28(j) on the same day. *Id.*, pp. 8-9. In the interim, the *Acosta* panel amended its initial opinion on June 18, 1996. App. A, pp. 5-6. The *Acosta* panel then denied Yawczak's motion to file the letter brief on June 26, 1996. App. C, p. 10.

Moreover, the *Reynolds* panel recognized that qualified immunity does not depend on "whether another reasonable or more reasonable interpretation of events can be constructed . . . after the fact." *Id.* (*quoting Hunter v. Bryant*, 502 U.S. at 228). The *Acosta* panel, on the other hand, would require that Yawczak: (1) determine what caused the car to move toward him, and (2) determine whether or not he could avoid being hit by the car that was just inches in front of him.[10] According to the *Acosta* panel, these calculations should have been made prior to Yawczak's firing his weapon.

2. The cases on which the Court actually relied are wrongly decided or distinguishable.

In its May 17, 1996 opinion, the *Acosta* panel cited several past decisions suggesting that the analyses on the merits in an excessive force case and on the question of qualified immunity are one and the same. App. A, pp. 5-6. As noted above, the reasoning of these cases is inconsistent with Supreme Court precedent. After Yawczak submitted his petition for rehearing and rehearing *en banc*, the *Acosta* panel deleted references to those cases but continued to rely on their reasoning. That reliance is misplaced.

Hopkins v. Andaya, 958 F.2d 881, 885 (9th Cir. 1992), was wrongly decided for several reasons. First, *Hopkins* ignores the two distinct and separate analyses required

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[10] It was undisputed that Yawczak had identified himself as a police officer and ordered the men in the car to freeze as he stood directly and immediately in front of the car.

under *Anderson v. Creighton*. Second, *Hopkins* relies on another Ninth Circuit case, *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir.), *cert. denied*, 506 U.S. 972 (1991), to support its holding that the analyses are the same. A careful reading of *Curnow*, however, shows that the *Curnow* court reviewed an appeal of the denial of a motion for summary judgment on the basis of qualified immunity and not the reasonableness of the force employed under the Fourth Amendment. *Id.* at 323-25. In fact, the *Curnow* court employed the distinct and appropriate standard in deciding the qualified immunity question. *Id.* at 325.

Similarly, in *Scott v. Henrich*, 39 F.3d 912, 914-15 (9th Cir. 1994), also relied upon by the *Acosta* panel, there is no analysis whatsoever. Rather, there is merely a passing citation to *Hopkins*. Finally, *Morgan v. Woessner*, 997 F.2d 1244, 1260 (9th Cir. 1993), *cert. dismissed, Serle v. Morgan*, 510 U.S. 1033 (1994) is easily distinguishable. In that case, the police officer knowingly violated the law by detaining a suspect when he *knew* that he did not have reasonable suspicion to justify the detention. *Id.* at 1260.[11]

The *Acosta* panel's approach ignores this Court's precedent and illustrates the conflicting authorities and uncertainty within the Ninth Circuit regarding qualified

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[11] In reality, *Morgan* is akin to First Amendment cases such as *Sloman v. Tadlock*, 21 F.3d 1462 (9th Cir. 1994). In imposing liability in *Sloman*, the jury necessarily found that the officer intended to interfere with the plaintiff's First Amendment rights. *Id.* at 1468. Indeed, the *Sloman* court specifically distinguished that case from "excessive force cases, . . . where the defendant's conduct is evaluated under an objective 'reasonableness' standard." *Id.* at 1468 n.7.

immunity for police officers in excessive force cases. Certiorari should be granted to reconcile that which the Ninth Circuit has been unable or unwilling to reconcile.

C. Fairness requires a new trial

The *Acosta* panel acknowledged that the district court should have ruled on the new trial motion, but failed to do so. App. A, p. 17 (*citing* Fed.R.Civ.P. 50(c)(1)). Instead of remanding the case to allow the district court to decide the issue, the panel denied Yawczak's motion for new trial based on the jury's verdict against Yawczak on the excessive force question. This is improper and unfair for several reasons.

First, the record reflects that had there been a ruling, the district court would have granted conditionally Yawczak's new trial motion. This is the likely outcome given the district court's rulings on Yawczak's motions for judgment and for qualified immunity.

Moreover, as noted above, Yawczak vehemently disagrees that the jury's verdict provides all the factual findings necessary to the determination of qualified immunity. *Anderson* holds that the inquiries on liability and the immunity questions are distinct. Given *Acosta's* ruling eliminating that distinction, fairness dictates a new trial. This case was never tried on the basis that the jury would make the factual findings necessary to allow the judge to decide qualified immunity or that the jury would decide the qualified immunity question.

The *Acosta* panel acknowledges that the Ninth Circuit has provided few guidelines on the issue of whether the

judge or jury should decide qualified immunity. App. A, pp. 18-19 n. 17; 83 F.3d at 1149 n. 17. The trial judge indicated throughout the trial that the court would rule on qualified immunity. Thus, at trial, Yawczak had no notice that the jury would decide qualified immunity. As a consequence, the defense was precluded from arguing the essential second element of the qualified immunity analysis to the jury. Could *any* reasonable officer have believed that his or her life was in danger? Without question, Yawczak was entitled to immunity if he was mistaken about the driver's intentions. If it were known that these issues were to be decided by the jury, Yawczak would have made different arguments, presented additional witnesses, and prepared his experts for these additional issues.

By reversing the district court's decision on the qualified immunity issue and allowing the jury to decide the issue by implication, the *Acosta* panel has denied Yawczak the opportunity to have his qualified immunity defense heard in a meaningful manner. Because the Ninth Circuit had not provided guidance as to whether the district court judge or the jury should decide the qualified immunity question, it is unfair to now deny Yawczak a new trial. At a minimum, the district court judge, who was present at the trial, observed the witnesses, and heard all of the evidence, should be given the opportunity to rule on Yawczak's new trial motion in light of this *Acosta* panel's ruling.

VII. CONCLUSION

The purpose of qualified immunity is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). This Court has emphasized repeatedly the importance of giving law enforcement officials the latitude to make decisions in "circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. at 397. The panel's decision here does just the opposite. It grossly underestimates the dangers, both to peace officers and to the public at large, of permitting an officer's split-second decision to be tried "with the 20/20 vision of hindsight." *Id.* at 396. The *Acosta* panel ignored these essential precepts.

With this decision, the Court has eliminated the doctrine of qualified immunity in the excessive force context, an outcome an *en banc* Ninth Circuit previously described as "unacceptable." *Hammer v. Gross*, 932 F.2d at 850. The *Acosta* decision will have a chilling effect on officers who must face the prospect of civil liability when they make a good faith decision to defend themselves from the threat of great bodily harm. Simply put, this is the wrong message to send to this nation's law enforcement personnel. This decision inevitably will induce tentativeness and will dampen officers' desire and ability to fulfill their

most important function: protecting the public. Certiorari should be granted.

Dated: September 30, 1996

Respectfully submitted,

LOUISE H. RENNE
San Francisco City Attorney

PATRICK J. MAHONEY
Chief Trial Deputy – *Counsel of Record*

KIMON MANOLIUS
Deputy City Attorney – Of Counsel

Counsel for Petitioner Daniel Yawczak

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUDI ACOSTA; ALMA ACOSTA, *Plaintiffs-Appellants,* v. CITY AND COUNTY OF SAN FRANCISCO; DANIEL YAWCZAK, *Defendants-Appellees.*	No. 94-16272 D.C. No. CV-92-04321-SC ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted
December 5, 1995 – San Francisco, California

Filed May 17, 1996
Amended June 18, 1996

Before: Alfred T. Goodwin and Stephen Reinhardt, Circuit Judges and Samuel P. King,* District Judge.

Opinion by Judge Reinhardt

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

SUMMARY

Individual Rights/Civil Rights/Government Law

The court of appeals reversed a district court judgment and remanded. The court held that the district court improperly granted qualified immunity as a matter of law to a police officer after a jury returned a verdict against the officer for excessive use of deadly force.

Off-duty police officer appellee Daniel Yawczak heard a woman scream and saw two men running with a purse. He drew his gun and chased the men. The men got into a waiting car. Yawczak was in front of the car when he shot and killed the driver, Michael Acosta. Michael's parents, appellants Rudi and Alma Acosta, filed a civil rights suit against Yawczak and appellees the City and County of San Francisco.

At trial, there were conflicting accounts of what happened. The disputed issues included whether one of the passengers said, "Run him over" prior to Yawczak's first shot; whether Yawczak saw Acosta move the car transmission lever into gear; whether the car was moving in the direction of Yawczak prior to the first shot; if the car was moving, how fast; and Yawczak's location at the time he fired. A jury found that Yawczak used excessive force and awarded damages to the Acostas.

The district court granted Yawczak's motion for judgment on the merits as a matter of law on the ground of qualified immunity and dismissed the entire complaint with prejudice. The court failed to rule on Yawczak's motion in the alternative for a new trial. The court found

that Yawczak's use of force was reasonable and not excessive because no reasonable juror could have concluded that the car did not move prior to the first time Yawczak fired at Acosta. The Acostas appealed.

[1] In determining whether to grant a motion on the merits as a matter of law, a court must view the evidence in the light most favorable to the non-moving party. Instead of discussing the dispositive issue of whether the evidence, viewed most favorably to the Acostas, permitted a conclusion that a reasonable officer in Yawczak's position would not have believed himself to be in danger, the district court granted judgment as a matter of law on the basis of its determination that a reasonable juror could not have concluded that the car did not move. While the district court may have been right on that point, it erred in reversing the jury's verdict on that basis.

[2] The jury could have reasonably concluded that the car did move prior to Yawczak's shooting Acosta, but that it was moving so slowly that a reasonable officer in Yawczak's position would have recognized that he could have stepped aside to avoid being injured and was therefore not in danger of serious bodily harm. There was a sufficient basis for the jury to find that Yawczak used excessive force, and the grant of judgment as a matter of law was improper.

[3] In determining whether a law enforcement officer is entitled to qualified immunity, a judge or jury must find (1) that the law governing the officer's conduct was clearly established, and (2) that under that law, a reasonable officer could have reasonably believed that his conduct was lawful. [4] Regardless of whether a judge or jury

determines the issue of qualified immunity, the decision-maker must rely on the jury's factual findings as to the disputed issues of fact.

[5] The factual findings the jury must have reached in determining Yawczak used excessive force were dispositive of the question of his entitlement to qualified immunity because they resolved the issue of whether it was objectively reasonable for Yawczak to believe that the use of deadly force was lawful. There was evidence that the car was moving so slowly that Yawczak could not have reasonably believed it posed a threat of great bodily harm. Though Yawczak disputed that evidence, it was likely the jury disbelieved Yawczak because much of his testimony was contradicted by witnesses. If the jury found that the force used by Yawczak was excessive, it necessarily found that Acosta was not driving the vehicle at him at a high speed.

[6] If the jury's version of the facts was accepted, Yawczak could not be entitled to qualified immunity. Because the law governing the shooting of a fleeing suspect is clearly established and because a reasonable officer could not have reasonably believed that shooting at the driver of the slowly moving car was lawful, Yawczak was not entitled to qualified immunity.

[7] When a party moves for a judgment as a matter of law, and alternatively for a new trial, the district court must, after granting the judgment as a matter of law, rule on the motion for new trial. [8] When a district court fails to issue a conditional ruling on a motion in the alternative for a new trial, the court of appeals has discretion to decide the issue.

[9] Yawczak moved for a new trial on the basis that the court failed to submit six special interrogatories to the jury. Four related to state law claims, one appeared on the verdict form that was completed by the jury, and the other asked whether the car moved prior to the time Yawczak fired his first shot at the driver. [10] The district court acted within its discretion in not submitting the interrogatories to the jury. The new trial motion lacked merit. Remand was warranted for entry of the jury's verdict.

COUNSEL

Andrew C. Schwartz and Rachel Bernstein, Casper, Meadows and Schwartz, Walnut Creek, California; Richard Rosenstock (argued), Santa Fe, New Mexico, for the plaintiffs-appellants.

Kimon Manolius and Patrick J. Mahoney (argued). Deputy City Attorneys, San Francisco, California, for the defendants-appellees.

ORDER

The opinion filed on May 17, 1996, is amended as follows:

On slip opinion pages 5905, lines 19-27, delete: "Our holding is consistent with our prior deicisons in which we concluded that '[i]n Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits.' *Scott v. Henrich*, 39 F.3d at 914 (internal quotation marks and citation omitted). *See, e.g., Morgan v. Woessner*, 997

F.2d 1244, 1260 (9th Cir. 1993), *cert. dismissed, Serle v. Morgan*, 114 S.Ct. 671 (1994); *Hopkins v. Andaya*, 958 F.2d 881, 885 n.3 (9th Cir. 1992). That is surely true in this case."

OPINION

REINHARDT, Circuit Judge:

Plaintiffs Rudi and Alma Acosta whose 21 year-old son, Michael Acosta, was shot and killed by San Francisco Police Inspector Daniel Yawczak appeal the district court's judgment as a matter of law in favor of the defendants.

The Acostas sued the City and County of San Francisco, its police chief, and officer Yawczak, alleging causes of action under 42 U.S.C. § 1983 and California state law.[1] The trial was bifurcated. The Acostas' suit against Yawczak proceeded to trial first and the district court stayed discovery in the suit against the municipality and the Police Chief.

The following facts are not in dispute: On November 2, 1991 at 6:45 p.m., Yawczak, a San Francisco police officer who was off-duty and in plainclothes, was standing in front of his car in the Pacific Heights neighborhood of San Francisco when he heard a woman scream and saw two young men, Ernesto Pecson and Edwin Silva, running with what he believed to be a purse. Yawczak drew his gun, a .45 caliber semiautomatic pistol, and chased Pecson and Silva around the block. After Pecson and

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[1] The plaintiffs withdrew their state law claim at trial.

Silva got into a waiting car, Yawczak fired two shots into the car, the first of which killed the driver, Acosta. The jury was required to determine whether in doing so Yawczak used excessive force.

At the close of the plaintiffs' case, Yawczak moved for judgment as a matter of law on the merits and on the ground of qualified immunity. The district court took the motions under submission.[2] At the close of evidence, Yawczak renewed the motions and the court again took them under submission pending the jury's verdict.

The jury found that Yawczak violated Michael Acosta's constitutional rights by using excessive force against him and returned a verdict in favor of the plaintiffs.[3] Subsequently, the jury awarded $225,000 for Mr.

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[2] In response to defense counsel's inquiry as to when the district court would rule on its qualified immunity motion, the court said: "I denied it for this stage. You can renew it after trial."

[3] The jury was instructed to assess the reasonableness of the force used by Yawczak according to the excessive force standard articulated by the Supreme Court in *Graham v. Connor*, 490 U.S. 386, 396-97 (1989):

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The nature of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving. The reasonableness inquiry is an objective one: the question is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him without regard to his

and Mrs. Acosta's non-economic damages, $25,000 for Michael Acosta's pain and suffering, and $9,358.19 for funeral and burial expenses. After the jury returned its verdict on liability, Yawczak orally renewed his motions and filed an alternative motion for a new trial.

Following the jury's award of damages, the district court granted defendant Yawczak's motions for judgment on the merits as a matter of law and on the ground of qualified immunity. When it granted judgment in Yawczak's favor, the district court also dismissed the Acostas'

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underlying intent or motivation. An officer's "evil" intentions will not make a constitutional violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

The reasonableness of a particular use of force must be judged in light of the fact that a police officer has a right to use such force, including deadly force, as is necessary under the circumstances to protect himself and others from what he reasonably believes to be a threat of great bodily injury or harm.

If you find that at the moment Inspector Yawczak fired the first shot at Michael Acosta he reasonably believed that deadly force was necessary to protect himself or others from what he reasonably believed to be a threat of great bodily injury or harm, then I instruct you that his use of force was lawful and not excessive.

On the other hand, if you find that at the moment that he fired the first shot at Michael Acosta, Inspector Yawczak did not reasonably believe that deadly force was necessary to protect himself or others from what he reasonably believed to be a threat of great bodily injury or harm, then I instruct you that his use of force was excessive and unlawful.

entire complaint with prejudice, thereby dismissing their claims against the City and County of San Francisco and the Chief of Police.[4] The district court failed, however, to rule on Yawczak's motion in the alternative for a new trial.

DISCUSSION

I. Judgment as a Matter of Law

The district judge made detailed findings of fact in his order granting judgment in favor of Yawczak. In making these findings, he did not view the evidence presented at trial in the light most favorable to the plaintiffs and, in fact, included a "finding" that directly contradicted the jury's verdict.[5] Based on his factual findings, the district judge held that Yawczak was entitled to judgment as a matter of law because no reasonable juror could have concluded that the car did not move prior to the first time he fired at Acosta.

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[4] We reject the defendants' contention that the plaintiffs have waived any right to have the district court's judgment reversed as to the City and County of San Francisco and Police Chief Casey because they failed to raise any issues on appeal regarding these defendants. As the plaintiffs point out, these claims remain untried. Plaintiffs are clearly appealing the district court's judgment in its entirety, which includes the dismissal of the untried claims.

[5] The district court's factual finding #13 reads: "Based on the totality of the circumstances, Inspector Yawczak's use of force at the moment of firing the shot that killed Michael Acosta was reasonable and not excessive." We need not consider here whether this finding is actually a conclusion of law.

We review the district court's grant of judgment as a matter of law de novo. *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1460 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2163 (1994). Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the non-moving party, allows only one reasonable conclusion and that conclusion is contrary to that reached by the jury. *Id.*

The jury in this case was faced with conflicting evidence regarding various factual issues. Among them were: whether one of the passengers said "Run him over" prior to Yawczak's first shot at Acosta; whether Yawczak saw Acosta move the car transmission lever into gear; whether the car was moving in the direction of Yawczak prior to the first shot; if the car was moving, how fast; and Yawczak's location at the time he fired the shots. In order to reach its verdict that the force used by Yawczak was excessive, the jury had to resolve at least some of these factual disputes.

[1] Although the district court stated that it recognized its obligation to view the evidence in the light most favorable to the non-moving party, it failed to do so. The district court's discussion of whether the defendant was entitled to judgment as a matter of law is limited to whether there was a legally sufficient basis to support the conclusion that the car did not move prior to the time Yawczak first fired at Acosta.[6] The answer to that

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[6] The final paragraph of the district court's order reads as follows:

question, however, is not dispositive of plaintiffs' claim. Instead of addressing the dispositive issue: whether the evidence, viewed most favorably to the Acostas, permitted a conclusion that a reasonable officer in Yawczak's position would not have believed himself to be in danger, the district court granted judgment on the basis of its determination that a reasonable juror could not have concluded "that the car did not move." While the district court may have been correct that no reasonable juror could have reached that conclusion,[7] it erred in reversing the jury's verdict on that basis.

> The court finds as a matter of law, that plaintiffs failed to prove that the car did not move forward before Inspector Yawczak fired at the driver. The court further finds that the defense proved by a preponderance of the evidence that the car did move forward prior to the first shot. The only reasonable conclusion a jury could reach is that the plaintiffs failed to prove by a preponderance of the evidence that Inspector Yawczak's use of force was objectively unreasonable. Yawczak is accordingly entitled to judgment as a matter of law.

[7] As the defendants and the district court note, the only direct evidence that the car moved before Yawczak fired at Acosta was the testimony of Yawczak himself and of Pecson, who testified that the car began to roll slowly. There were other witnesses who testified that the car did not move prior to Yawczak's first shot at Acosta, namely Stacey Rothberg, Shannon Martinusen, and David Martinusen – three students walking down the street at the time of the incident. However, their testimony was not based on what they saw; it was based on what they heard because they started running in the other direction after David saw Yawczak's gun. Their testimony as to whether or not the car moved was based on the fact that it was only after the first shot that they "heard" the car move. The only other "eye"-witnesses to the incident either did not start paying

[2] On the basis of the evidence presented at trial, the jury could have reasonably concluded that a reasonable officer, who had positioned himself facing the driver so that he was standing closer to the side than the dead-center of the car, would have recognized that he could avoid being injured when the car moved slowly,[8] by simply stepping to the side.[9] In short, a juror could have reasonably reached the conclusion at which the jury appears to have arrived; that the car did move prior to Yawczak's shooting Acosta but that it was moving or

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attention until after they heard shots and therefore could not testify as to whether the car moved before the first shot, turned away before Yawczak even reached the car, or were uncertain as to whether they began looking before or after the first shot was fired.

[8] Pecson, one of the passengers in the car, stated that no one in the car did or said anything after they saw Yawczak standing in front of the car. Pecson, who was the only witness other than Yawczak to say that the car moved before Yawczak fired at Acosta, stated that it moved "just a little; just a little movement." An expert witness testified that an officer in Yawczak's position would have had an ample opportunity to move out of the way of the vehicle without suffering serious bodily harm, given the evidence regarding Yawczak's location, the car's location, and the nature of the car's movement.

[9] There is no question that an automobile *can* inflict deadly force and thus under certain circumstances can constitute the type of threat that justifies an officer's shooting the driver. *U.S. v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987), *cert. denied*, 484 U.S. 1077 (1988). Viewing the evidence in the light most favorable to the plaintiffs, this is not such a circumstance. The cases relied upon by the district court and the defendants, cases in which the police officer's use of deadly force against a driver was found to be reasonable, are different from this case in a most important respect – the speed at which the vehicle was traveling and the officer's ability to avoid the oncoming vehicle.

rolling sufficiently slowly that a reasonable officer in Yawczak's position would not have perceived himself to be in danger of serious bodily harm. Thus, there was a sufficient evidentiary basis for a reasonable juror to find that Yawczak used excessive force and to join in a verdict in favor of the Acostas. The grant of judgment as a matter of law for Yawczak was improper.

II. Qualified Immunity

[3] Determining whether a law enforcement officer is entitled to qualified immunity involves the consideration of two questions: "1) Was the law governing the officer's conduct clearly established? 2) Under that law, could a reasonable officer have believed that his conduct was lawful?" *Sinaloa Lake Owners Assoc. v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995) (quoting *Act Up!/ Portland*, 988 F.2d 868, 871 (9th Cir. 1993)).[10] The district court properly concluded that the law governing when an officer may use deadly force against an unarmed fleeing suspect was clearly established at the time of Acosta's

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[10] We note that this is not a case in which the issue of qualified immunity should have been decided at an early stage in the litigation because the immunity inquiry does not depend on an essentially legal question. *See e.g., Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 2156 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985). Here, qualified immunity could only be decided after disputes were resolved as to the facts and circumstances within Yawczak's knowledge and as to what Yawczak and Acosta actually did. *Sloman v. Tadlock*, 21 F.3d 1462, 1467 (9th Cir. 1994). Accordingly, the defendants properly did not ask the district court to decide the immunity issue on summary judgment.

shooting. *See, e.g., Scott v. Henrich,* 39 F.3d 912, 914 (9th Cir. 1994) ("An officer's use of *deadly* force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' "), *cert. denied,* 115 S.Ct. 2612 (1995) (citation omitted).

[4] However, the district court erred in concluding that a reasonable officer in Yawczak's position could have reasonably believed that shooting at the driver of a slow-moving car was lawful. Instead of relying on the factual findings implicit in the jury's verdict in favor of the Acostas, the district court granted Yawczak qualified immunity based on its own contrary factual findings. The Acostas argue that regardless of whether it is the judge or the jury who makes the ultimate determination on the issue of qualified immunity, that decisionmaker must rely on the jury's factual findings as to the disputed issues of fact. They are correct. Regardless of who makes the ultimate determination as to qualified immunity, the jury, not the judge, must decide the disputed "foundational" or "historical" facts that underlie the determination. *See, e.g., Sinaloa,* 70 F.3d at 1099; *Sloman v. Tadlock,* 21 F.3d 1462, 1468 (9th Cir. 1994).

[5] The factual findings the jury must have made to reach its verdict that Yawczak violated Acosta's constitutional rights by using excessive force are dispositive of the question of Yawczak's entitlement to qualified immunity because they resolve the issue of whether it was objectively reasonable for Yawczak to believe that the use of deadly force was lawful. The jury was asked to evaluate the objective reasonableness of Yawczak's conduct. In order to do so, it first had to determine what Yawczak

actually did. In that connection, the jury was presented with evidence that when Yawczak shot at Acosta, the car was moving or rolling very slowly from a standstill, so slowly that he could not have reasonably believed that it posed a threat of great bodily harm. While that evidence was disputed by Yawczak, and while Pecson's role in the affair was not such as would engender confidence in the truthfulness of his testimony, the jury had a fair opportunity to make credibility judgments regarding the witnesses' testimony.[11] In fact, a review of the record reveals that it is highly likely that the jury developed serious doubts regarding Yawczak's veracity.[12] If the jury found

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[11] While Pecson's testimony was introduced by way of deposition, it is the objective facts and related circumstances that appear to be most damaging to Yawczak's version of the events and thus most supportive of Pecson's. *See, e.g., infra* note 12.

[12] Yawczak's testimony was contradicted by that of several independent witnesses as to many aspects of the shooting. Contrary to Yawczak's testimony, several bystanders testified that he threatened to blow the alleged purse-snatchers' heads off; another witness testified that Yawczak stepped to the side of the car although he claimed to have rolled off the hood; yet another witness testified that Yawczak's buttocks never touched the ground whereas Yawczak said he fired one of the shots while sitting on them. Also, the medical examiner who examined Michael Acosta's body testified that Yawczak's account of having fired a shot from a seated position or on his buttocks was inconsistent with the physical evidence. Finally, during the course of the testimony of the plaintiffs' expert witness, the jury learned that the account of the shooting Yawczak gave at trial differed in numerous respects from the accounts he had previously given, once during an interview after the incident and once when he was deposed.

that the force used by Yawczak was excessive, it necessarily found that Acosta was not driving the vehicle at him at a high rate of speed. In short, in order to reach its verdict, the jury must have found that at the moment that Yawczak fired the deadly shot at Acosta, it was not reasonable for him to believe that Acosta posed a threat of great bodily injury or harm to him or to anyone else.[13]

Yawczak acknowledges that an individual's right not to be subjected to excessive force is well established. However, he appears to argue that it was objectively reasonable for him to believe that using deadly force against Acosta under the circumstances did not violate Acosta's rights. However, as the Second Circuit observed under similar circumstances, "[t]he problem with this argument is that it depends upon the officers' version of the facts – a version the jury plainly rejected." *Posr v. Doherty*, 944 F.2d 91, 95-96 (2nd Cir. 1991).[14]

[6] If we accept the jury's version of the facts, Yawczak cannot be entitled to qualified immunity. Because the law governing "shooting to kill" a fleeing suspect is clearly established and because a reasonable officer could

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[13] The jury was instructed that Yawczak's use of force was only excessive and unlawful if "at the moment that he fired the first shot at Michael Acosta, Inspector Yawczak did not reasonably believe that deadly force was necessary to protect himself or others from what he reasonably believed to be a threat of great bodily injury or harm." We must assume that the jury acted in accordance with the instructions given it. *City of Los Angeles v. Heller*, 475 U.S. 796, 798 (1986).

[14] In *Posr*, as here, the court of appeals was compelled to infer from the verdict the nature of the facts that the jury found. *Id.* at 96.

not have reasonably believed that shooting at the driver of the slowly moving car was lawful, we hold that Yawczak is not entitled to qualified immunity.

III. New Trial Motion

[7] Rule 50(c)(1) of the Federal Rules of Civil Procedure requires that in cases in which a party has moved for judgment as a matter of law and, in the alternative, for a new trial, the district court must, after granting judgment as a matter of law, also rule on the motion for a new trial.[15] The district judge in this case failed to do so. Defendants urge us to deem the new trial motion to have been granted by the district court or to give the district court another opportunity to rule on it.

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[15] Rule 50(c)(1) provides:

> (1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

[8] Rule 50(c)(1) does not specify the consequences that follow from a district court's failure to issue a conditional ruling on a motion in the alternative for a new trial. *Vollrath Co. v. Sammi Corp.*, 9 F.3d 1455, 1458 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2163 (1994). We have concluded, however, that we have discretion to either remand to the district court to let it decide the new trial motion or to decide the new trial motion ourselves. *Id.* In this case, the circumstances dictate the latter course.

[9] Yawczak moved for a new trial solely on the ground that the district court failed to submit special interrogatories to the jury.[16] The defense asked for six special interrogatories, four of which related to the plaintiffs' withdrawn state law claim. Of the two other questions proposed by the defendants, one was the question that actually appeared on the verdict form that was completed by the jury: whether Yawczak violated Acosta's constitutional rights by using excessive force. The jury answered that question in the affirmative. The other question proposed by the defendant was whether the car moved prior to the time Yawczak fired his first shot at the driver. As we have already concluded, given the other evidence in the record, the answer to that question does not resolve the qualified immunity issue.

[10] Whether to submit special interrogatories to the jury is a matter committed to the discretion of the

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[16] In their brief, the defendants seem to offer additional grounds in support of their original motion for a new trial. However, their effort to amend their original new trial motion on appeal is not appropriate in this case. We consider only the ground raised in the new trial motion filed in district court.

district court. Fed. R. Civ. P. 49(b); *Frank Briscoe, Co., Inc. v. Clark County*, 857 F.2d 606, 614 (9th Cir. 1988), *cert. denied*, 490 U.S. 1048 (1989). Whatever the limits of that discretion may be, the defendants offer no reason to conclude that the district court exceeded them in this case. The defendants argue that the jury's answers to the special interrogatories would have assisted the district judge in making the qualified immunity determination.[17] The district judge concluded otherwise and in doing so he acted well within his discretion. *See, e.g., R.H. Baker & Co. v. Smith-Blair, Inc.*, 331 F.2d 506, 508 (9th Cir. 1964). Accordingly, the new trial motion was without merit, and we remand for entry of the jury's verdict.[18]

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[17] In *Sloman v. Tadlock*, 21 F.3d 1462 (9th Cir. 1994), we pointed out that in qualified immunity cases in which the immunity determination is made after trial whether the judge or the jury should make that determination is still an unanswered question. 21 F.3d at 1468; *see also Sinaloa*, 70 F.3d at 1099 ("If there are genuine issues of material fact in issue relating to the historical facts of what the official knew or what he did, it is clear that these are questions of fact for the jury to determine. The difficult issue is whether, when there are disputed issues of historical fact, the entire second mixed question of law and fact should be submitted to the jury under appropriate instructions as we do in negligence cases or whether the jury should be instructed only to find the historical facts with the judge to make the ultimate determination."). We do not need to answer that question here.

[18] The Fourth Circuit followed this procedure in *Mays v. Pioneer Lumber Corp.*, 502 F.2d 106 (4th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975), (cited with approval in our opinion in *Vollrath*, 9 F.3d at 1459, as well as in Moore's *Federal Practice*, 5A Moore's *Federal Practice* ¶ 50.14 at 50-120), after concluding "that no useful purpose would be served by remanding to the district judge to entertain and decide a renewed motion for a new trial."

CONCLUSION

We reverse the district court's grant of qualified immunity and judgment as a matter of law and deny the new trial motion.

We reinstate the jury's verdict against Yawczak, reverse the dismissal of the plaintiffs' complaint and reinstate their claims against the remaining defendants. The Acostas are entitled to attorney's fees for the district court and appellate proceedings thus far.

REVERSED AND REMANDED.

Mays, 502 F.2d at 110. Given the nature of the new trial motion filed with the district court here, we reach the same conclusion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUDI ACOSTA, et al., Plaintiff, vs. DANIEL YAWCZAK, Defendant.	C-92-4321-SC ORDER GRANTING MOTION FOR QUALIFIED IMMUNITY AND DIRECTED VERDICT (Filed Jun. 21, 1994)

I. INTRODUCTION AND BACKGROUND

On the night of November 2, 1991, Daniel Yawczak, an off-duty San Francisco police officer shot and killed Michael Acosta, the driver of a getaway car involved in a robbery. Acosta's parents brought this 1983 action alleging that Yawczak violated their son's constitutional rights under color of law by using excessive force against him.

The matter was tried to a jury on May 4, 1994. The jury returned a verdict in favor of plaintiffs and awarded damages in the amount of $259,358.19 for plaintiffs' loss of consortium, pain and suffering and funeral and burial expenses.

Defendant made timely motions for qualified immunity at the close of plaintiffs' evidence and before the case was submitted to the jury. Defendant further made a timely motion for a judgment according to law under Fed. R. Civ. P. Rule 50. Having heard all the evidence introduced at trial and having considered the arguments of counsel, the court now grants both motions. The court

finds that Inspector Yawczak is entitled to qualified immunity for his role in the shooting death of Michael Acosta and further finds that no reasonable jury could have found for the plaintiffs on the evidence presented at trial.

II. LEGAL STANDARD

A. Judgment As A Matter of Law

Under Federal Rule of Civil Procedure 50, a party is entitled to judgment as a matter of law, and a court must direct a verdict, if "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 2505, 2511 (1986). The court in rendering its verdict according to the law has considered the evidence in a light most favorable to the plaintiffs.

B. Qualified Immunity

Police officers are ordinarily entitled to qualified immunity from suit for actions taken in the course and scope of their official duties. The test for immunity is whether, "in light of clearly established principles governing the conduct in question, the officer could have reasonably believed that his conduct was lawful." *Act Up!/Portland v. Bagley, (Act Up I)* 971 F. 2d 298, 300-301 (9th Cir. 1992); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (test is whether a reasonable officer could have believed his conduct to be lawful, in light of clearly established law and the information he possessed at the time). The qualified

immunity doctrine "protects all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Whether a law enforcement officer is entitled to qualified immunity is a question of law for the court to decide. *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991) (expressly rejecting former Ninth Circuit rule that question of qualified immunity is issue for jury to decide); *Act Up I*, 971 F. 2d at 301 (qualified immunity is "a question of law that must be determined by the *district court*. . . . ") (emphasis in original); *Act Up!/Portland v. Bagley*, (*Act Up II*) 988 F. 2d 868, 873-77 (9th Cir. 1993) (whether police entitled to qualified immunity is "an essentially legal question."); *see also Simunkunas v. Tardi*, 930 F.2d 1287, 1291 (7th Cir. 1991); *Alvardo v. Picur*, 859 F. 2d 448, 441 (7th Cir. 1988).

Qualified immunity doctrine operates as an immunity from suit rather than as "a mere defense to liability." *Hunter*, 112 S.Ct. 534, 537. Therefore, the immunity determination should ordinarily be made well in advance of trial, usually on a motion for summary judgment. *Act Up II*, 988 F. 2d at 873. However,

> [i]f a genuine issue of fact exists preventing a determination at summary judgment, the court may permit the case to proceed to trial and make the qualified immunity determination after the facts have been fully aired in the courtroom.

Act Up I, 971 F. 2d at 302; *Jones v. City of Chicago*: 856 F. 2d 994, 995 (7th Cir. 1988) (proper for judge to submit liability issue to jury and make independent factual findings on qualified immunity; on appeal issue is whether trial

court's independent findings on immunity are supported by sufficient evidence).

III. FINDINGS OF FACT

Based on the evidence introduced at trial, the court makes the following findings in connection with Defendant's motion for qualified immunity.

1. On the night of November 2, 1991, Daniel Yawczak, an off-duty San Francisco police officer, was walking towards his car when he heard a woman screaming "Help, Police." He then saw two young men running from the direction of the screams. One of the men carried a woman's purse under his arm.

2. Yawczak had reasonable cause to believe that a crime had been committed, but did not know the extent or seriousness of the crime.

3. Yawczak was not in uniform. He carried no baton, chemical mace or police radio. He was, however, armed with his service weapon, an auto-loading .45 caliber handgun, pursuant to departmental policy and regulations.

4. Yawczak pursued the men on foot, shouting "Police!" and "Freeze!" as he ran. Yawczak pursued the suspects as they turned a corner and ran to a double-parked car. The car's engine was running. The suspects entered the car. The decedent, Michael Acosta, was sitting behind the wheel in the driver's seat. The driver's side window was rolled down.

5. Yawczak ran to the front of the car and, with his weapon drawn, identified himself as a police officer and

ordered the men not to move. Ernesto Pecson, one of the suspects that Yawczak saw enter the car, stated that he thought Yawczak was a police officer and that while in the car he heard Yawczak order the occupants to freeze. Inspector Yawczak stood immediately in front of the vehicle's front bumper. The car was facing downhill. Inspector Yawczak stands over six feet tall. Inspector Yawczak was in a position to see the suspects' movement inside of the car. Yawczak's decision to stand in front of the vehicle was consistent with proper police procedure.

6. In response to Yawczak's commands, one of the men inside of the of the car shouted "Go! Go! Run him over." Inspector Yawczak heard this statement.

7. Inspector Yawczak saw the driver move the transmission lever into gear. The car moved forward towards Inspector Yawczak. Acosta had reason to flee. He was involved in a crime and was driving with a suspended license. At the time of the incident, Acosta's blood alcohol level was between .06 and .08.

8. Fearing for his life, while the car moved toward him, Yawczak fired one shot through the windshield. The car struck Yawczak immediately after he fired the first shot. Yawczak rolled over the hood and off the left fender of the car. Yawczak fired a second shot through the open driver's side window as he rose to his feet. Both shots struck the driver, Michael Acosta.

9. After Yawczak fired the second shot, Ernesto Pecson, who was sitting in the passenger seat, stepped on the gas pedal. The car accelerated away from the scene at a high rate of speed.

10. At the moment of firing the first shot, Inspector Yawczak reasonably believed that he was at imminent risk of death or serious bodily injury.

11. Inspector Yawczak had no duty to retreat or anticipate that the suspects would resist arrest. Yawczak did *not* deviate from proper police procedures by chasing the suspects to the car, or by placing himself in front of the car, or by firing the shot that killed Michael Acosta.

12. Hours after the incident, police officers discovered the car abandoned in a parking lot. Michael Acosta's body was found inside of the car. Acosta was killed by the first shot fired by inspector Yawczak. The first shot punctured Acosta's heart resulting in a rapid loss of blood pressure. Acosta lost consciousness and died almost immediately. The second shot grazed Acosta's upper body and punctured his right forearm.

13. Based on the totality of the circumstances, Inspector Yawczak's use of force at the moment of firing the shot that killed Michael Acosta was reasonable and not excessive.

IV. DISCUSSION

A. Qualified Immunity

The law governing the use of deadly force by a police officer was clearly established at the time of the Acosta shooting. A police officer's use of deadly force is constitutionally permissible if, at the moment of firing his weapon, he had reasonable cause to believe that a suspect poses a threat of death or serious harm to himself or

others. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). Moreover,

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. 386, 396-97 (1989).

There is no question that the car moving toward Inspector Yawczak constituted a threat of great of [of] bodily injury sufficient to satisfy the requirements of *Tennessee v. Garner*. The Ninth Circuit has recognized that a car can be used as a deadly weapon. *U.S. v. Sanchez*, 914 F.2d 1355, 1457 (9th Cir. 1990); *accord Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992); *U.S. v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987) ("It is indisputable that an automobile can inflict deadly force on a person and that it can be used as a deadly weapon.") Inspector Yawczak heard a passenger inside of the car shout "Go, go! Run him over!" He was standing immediately in front of the car's bumper when he saw the driver put the car in gear and felt the car move forward. Under these circumstances, Yawczak was justified in using deadly force to protect himself from an imminent risk of death or serious injury. Clearly, a reasonable officer standing in Yawczak's

shoes could reasonably believe that firing his weapon in such a situation would be lawful.[1]

B. Judgment As A Matter of Law

Inspector Yawczak is entitled to judgment as a matter of law on the merits of the case as well as qualified immunity. Federal Rule of Civil Procedure 50 provides that a court may direct the entry of judgment as a matter of law where "there is no legally sufficient evidentiary basis" to support a jury verdict.

Viewing the evidence in a light most favorable to plaintiffs, the court concludes that no reasonable jury could find for the plaintiffs, under applicable law, by a

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[1] The Fourth Circuit recently held that a police officer was entitled to qualified immunity in a shooting incident that involved strikingly similar facts. In *Drewitt v. Pratt*, 999 F.2d 774 (4th Cir. 1993), an off-duty plain-clothes police officer attempted to arrest a reckless driver. The officer ran toward the vehicle with his service revolver drawn. The officer yelled, "Police officer, stop! Turn the vehicle off!" While the officer was in front of the vehicle, the vehicle sped forward and knocked the officer up onto the hood. The officer fired into the windshield. His gun discharged a second time after he fell off the hood. Both shots hit the driver. The appellate court affirmed the district court's grant of qualified immunity finding that the officer reasonably believed that the driver posed a threat of serious bodily injury to him. *Id.* at 780. The court further held that the test of reasonableness is measured at the moment of firing and expressly rejected the argument that an officer is not entitled to qualified immunity where he recklessly creates the circumstances of his own endangerment. *Id.* at 779. *See also Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) (summary judgment granted in favor of police officer who fired at pick-up truck to prevent his own death or great bodily harm).

preponderance of the evidence. The jury's finding of excessive force is contrary to the overwhelming weight of the evidence introduced at trial and amounts to a finding that Yawczak, at the moment of firing, did not reasonably believe that the driver posed an imminent threat of serious injury. Such a finding is entirely unsupported by the evidence.

Plaintiffs presented no credible testimony at trial that the car did not move during the first shot. The only witnesses who so testified were Stacy Rothberg and David Martinusen, pedestrians walking in the vicinity of the shooting. However, both witnesses testified that they did not actually see officer Yawczak or the shooting itself. Moreover, they testified that they turned and ran away from the scene of the incident as soon [sic] Martinusen spotted one of the suspects carrying a gun.

Martinusen testified that he, Rothberg and his fiance, Shannon Griffiths, ran around the corner and concealed themselves in a hiding place after he spotted the suspect with the gun. Martinusen and Griffiths both testified that they did not see the car during the shooting. Instead, they testified that they only *heard* the car "take off" after the sound of gunfire. Their testimony is consistent with both Ernesto Pecson's admission that he stepped on the gas pedal after Yawczak fired the second shot and Yawczak's testimony that the car sped away after the shots were fired.

Rothberg testified that the car did not move before the shots were fired. However, her companions' testimony that the three were concealed in a hiding place

around the corner at the time of the shooting casts considerable doubt on her ability to observe the car.[2] Moreover, her account of the incident conflicted at several points with the testimony of Yawczak and every other eye-witness to the shooting. Rotherberg testified as follows:

> . . . SHANNON AND I WERE TALKING, AND ALL OF A SUDDEN WE SEE THESE TWO GUYS. WE KIND OF HEARD THEM, BUT WE SAW THESE TWO GUYS RUNNING TOWARDS US, AND THERE WAS A CAR DOUBLE-PARKED ALONG THE SIDE OF THE STREET. AND THEY WERE RUNNING TOWARDS THE CAR. THEN WE HEAR SOMEBODY YELL, "FREEZE. POLICE. OR I AM GOING TO BLOW YOUR HEAD OFF." AND THEN WE HEAR – THE GUYS ARE STILL RUNNING TOWARDS US. AND THEN WE HEAR ONE SHOT. IT SCARED US.
>
> SO WE STARTED – AND WE SAW THE TWO GUYS RUNNING TOWARDS US, SO WE DIDN'T KNOW IF THEY WERE COMING AT US OR TOWARDS THE CAR OR WHAT WAS GOING TO HAPPEN. SO WE STARTED TO RUN AROUND THE CORNER. THEN WE HEARD A SECOND SHOT, AND THEN THAT'S WHEN THE CAR TOOK OFF, AND WE STAYED THERE FOR ABOUT A MINUTE, AND THEN WE WANTED TO SEE WHAT HAD

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[2] For example, Shannon Griffiths testified that she was not looking at the car when the first shot was fired. RT-62. She stated that "We were running when the first shot was fired . . . so I must have seen the car before the gunshot, seen bodies and the car." *Id.*

HAPPENED, AND WE WENT AROUND THE CORNER AND THERE WAS NOTHING THERE.

According to Rothberg, the first shot was fired while the suspects were still on foot, running towards the car. Her testimony conflicts with the physical evidence of the shooting and contradicts the testimony of every other eye-witness to the incident, including that of Ernesto Pecson, who testified that he was sitting in the passenger seat next to Acosta when the fatal shot was fired.

John Moragne, who had the best view of the incident from a bay window overlooking the street, unequivocally stated that he saw the car move prior to the first shot. Pecson also stated that the car moved forward at Yawczak a split second before firing.

Rothberg's testimony that the car did not move until *after* both shots were fired was further contradicted by clear and convincing evidence that Yawczak was struck by the moving car. This fact was established by the testimony of Inspector Yawczak, John Moragne ("the police officer had to jump up"), Rochelle Alperts ("the police officer was limping afterwards"), and Dr. Stephens ("I saw a fabric print on the hood of the car that night"), as well as by the photographic evidence of hand marks on the hood.

The court finds as a matter of law, that plaintiffs failed to prove that the car did not move forward before Inspector Yawczak fired at the driver. The court further finds that the defense proved by a preponderance of the evidence that the car did move forward prior to the first shot. The only reasonable conclusion a jury could reach is

that the plaintiffs failed to prove by a preponderance of the evidence that Inspector Yawczak's use of force was objectively unreasonable. Yawczak is accordingly entitled to judgment as a matter of law.

IV. CONCLUSION

In accordance with the foregoing, it is HEREBY ORDERED that:

1. Defendant's motion for qualified immunity and judgment as a matter of law is GRANTED;

2. Judgment shall be entered in favor of defendant and against plaintiffs; plaintiffs to take nothing on the complaint.

3. The entire complaint is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED: June 17, 1994

/s/ Samuel Conti
United States
District Judge

APPENDIX C

CITY AND COUNTY OF SAN FRANCISCO

[LOGO] LOUISE H. RENNE
City Attorney

OFFICE OF THE CITY ATTORNEY

KIMON MANOLIUS
Deputy City Attorney

DIRECT DIAL: (415) 554-3935

June 6, 1996

Clerk
U.S. Court of Appeals
For The Ninth Circuit
121 Spear Street, 6th Floor
San Francisco, CA 94105

Re: Additional Citation for Appellee Yawczak's Petition for Rehearing and Rehearing En Banc in *Acosta v. City and County of San Francisco,* United States Court of Appeals for the Ninth Circuit No. 94-16272

Dear Clerk:

On Friday, May 31, 1996, Appellee Daniel Yawczak filed his petition for rehearing and rehearing en banc with this Court. The purpose of this letter is to provide an additional recent authority. That authority supports Appellee Yawczak's contention that the recent *Acosta* decision, which reversed the district court's order granting Yawczak's motion for judgment notwithstanding the verdict and motion for qualified immunity, is in conflict with the United States Supreme Court's prior decisions as well as with those by this Court. Appellee Yawczak respectfully requests that this letter brief be distributed

along with Yawczak's petition for rehearing and rehearing en banc.

In *Reynolds v. County of San Diego*, 96 C.D.O.S. 3752, 3755 (9th Cir. May 29, 1996), the Ninth Circuit affirmed the district court's order granting Deputy Jackson's summary judgment motion for qualified immunity in an excessive force death case.[1] Specifically, the *Reynolds* Court cited Supreme Court authority and determined that the analysis of qualified immunity is not the same as that on the merits under the Fourth Amendment. The *Reynolds* decision, filed May 28, 1996, is in direct conflict with the *Acosta* decision which was filed just 11 days earlier on May 17, 1996.

Reynolds is significant to Appellee Yawczak's petition for rehearing and rehearing en banc for several reasons. First, while the *Acosta* panel failed to cite any Supreme Court authority on qualified immunity, the *Reynolds* panel examined *Hunter v. Bryant*, 502 U.S. 224 (1991) and *Anderson v. Creighton*, 483 U.S. 635 (1987). The *Reynolds* court correctly held that qualified immunity applied so long as the officer "could have reasonably believed" that "his conduct was justified." *Reynolds*, 96 C.D.O.S. at 3755. Thus, the *Acosta* decision conflicts with the decisions of the Supreme Court.

Second, the *Reynolds* panel cited prior cases from this Circuit which held or recognized that the analysis of qualified immunity is not the same as that for liability under the Fourth Amendment in excessive force cases. For example, the Court noted that the qualified immunity

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[1] A copy of the opinion is attached.

standard "provides that *'regardless of whether the constitutional violation occurred,* the officer should prevail if the right asserted by the appellant was 'not clearly established' or the officer could have reasonably believed that his particular conduct was lawful.' " *Id.* at 3754 (citing and quoting *DeNieva v. Reyes,* 966 F.2d 480, 484-85 (9th Cir. 1992) and *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991)) (emphasis added). Obviously, if a violation had occurred and the analyses on qualified immunity and the excessive force issue are the same, there can be no qualified immunity.[2] This is precisely the "unacceptable result" which this Court warned against in *Hammer v. Gross,* 932 F.2d 842, 850 (9th Cir.) (en banc), *cert. denied,* 502 U.S. 980 (1991).

Third, the *Reynolds* panel was faced with minor factual inconsistencies, but recognized that officers are often faced with "rapidly evolving situations." *Id.* at 3755. In addition, in *Reynolds,* qualified immunity was appropriate even though the appellant in that case brought forth an alternate explanation of the cause of the suspect's movement which justified Deputy Jackson's use of deadly force.[3] *Id.* The Reynolds panel recognized that qualified immunity does not depend on "whether another reasonable or more reasonable interpretation of events can be

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[2] In dissent, Judge Pregerson specifically disagrees with his colleagues on this point. In a footnote, he quotes *Hopkins v. Andaya,* 958 F.2d 881, 885, n.3 (9th Cir. 1992): "In Fourth Amendment unreasonable force cases . . . the qualified immunity inquiry is the same as the inquiry on the merits."

[3] Appellant's expert theorized that Deputy Jackson himself had caused the suspect's sudden movement by pressing a gun into the suspect's neck.

constructed . . . after the fact." *Id.* (quoting *Hunter v. Bryant,* 502 U.S. at 228) The *Acosta* panel, on the other hand, would require that Yawczak: (1) determine what caused the car to move toward him, and (2) determine whether or not he could avoid being hit by the car that was just inches in front of him.[4] According to the *Acosta* panel, these calculations should have been made prior to Yawczak's firing his weapon.

Finally, the *Reynolds* panel correctly recognized that the fact that appellant's police experts disagreed with Deputy Jackson's actions did not create a genuine issue of material fact. Appellant's expert testified that Deputy Jackson used "reckless" tactics and should have showed more restraint. Deputy Jackson, however, was entitled to qualified immunity "notwithstanding that reasonable officers could disagree on an issue." *Id.* at 3755 (quoting *Act Up!/Portland,* 988 F.2d 868, 872 (9th Cir. 1993)). In *Acosta,* this Court alluded to "an expert witness who testified that an Officer in Yawczak's position "would have had ample opportunity to move out of the way of the vehicle without suffering serious bodily harm. . . . " Slip Op. at 5901-2, n.8. While there was no such testimony at the trial, such a disagreement with Yawczak's judgment does not defeat his entitlement to qualified immunity.

Rehearing and rehearing en banc is appropriate in this case. The *Acosta* decision is inconsistent with

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[4] It was undisputed that Yawczak had identified himself as a police officer and ordered the men in the car to freeze as he stood directly in front of the car.

Supreme Court precedent. In addition, this Circuit's jurisprudence on qualified immunity in excessive force cases is inconsistent and impossible to reconcile. As such, Appellee Yawczak respectfully requests that his petition for rehearing and rehearing en banc be granted. The *Acosta* decision must be reversed.

If you have any questions, or require further information, please let me know. I can be reached at (415) 554-3935. Thank you for your attention to this matter.

Very truly yours,

LOUISE H. RENNE
City Attorney
PATRICK J. MAHONEY
Chief Trial Deputy

/s/ Kimon Manolius
KIMON MANOLIUS
Deputy City Attorney

Attachment

C-6

No. 94-16272

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUDI ACOSTA AND ALMA ACOSTA,

Plaintiff-Appellants,

VS.

CITY AND COUNTY OF SAN FRANCISCO,
DANIEL YAWCZAK,

Defendant-Appellants.

Appeal From The Northern District of California
United States District Court No. CV-92-04321-SC

DEFENDANT-APPELLEE DANIEL YAWZCAK'S MOTION TO FILE SUPPLEMENTAL LETTER BRIEF

LOUISE H. RENNE
City Attorney
PATRICK J. MAHONEY
Chief Trial Deputy
KIMON MANOLIUS
MATTHEW D. DAVIS
Deputy City Attorneys
Fox Plaza, 6th Floor
1390 Market Street
San Francisco, CA 94102-5408
Telephone: (415) 554-3935
Facsimile: (415) 554-3837

Attorneys For Defendant-Appellee
Daniel Yawzcak

Defendant-Appellant Daniel Yawzcak moves for permission to file a supplemental letter brief on the ground that since he filed his petition for rehearing and rehearing en banc, the Ninth Circuit issued a new decision that is directly on point. The new decision, ***Reynolds v. County of San Diego***, 96 C.D.O.S. 3572 (9th Cir. May 29, 1996). The ***Reynolds*** decision is in direct conflict with the opinion at issue in this petition and therefore deserves separate briefing. A copy of the proposed letter brief is attached to this motion.[1]

DATED: June 21, 1996

LOUISE H. RENNE
City Attorney
PATRICK J. MAHONEY
Chief Trial Deputy

By: /s/ Matthew D. Davis
MATTHEW D. DAVIS
Deputy City Attorney

Attorneys for Defendant-Appellee

---

[1] Appellee shall also submit a separate letter to the clerk of the Court citing the *Reynolds* decision as supplemental authority. Fed. R. App. P. 28(j).

CITY AND COUNTY OF SAN FRANCISCO

[SEAL] LOUISE H. RENNE
City Attorney

OFFICE OF THE CITY ATTORNEY

MATTHEW D. DAVIS
Deputy City Attorney

DIRECT DIAL [415] 554-3948

JUNE 21, 1996

Clerk
United States Court of Appeals
For The Ninth Circuit
121 Spear Street, Sixth Floor
San Francisco, CA 94105

Re: ***Acosta v. City and County of San Francisco***
Ninth Circuit Court of Appeals No. 94-16272

Dear Clerk:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, defendant-appellee Daniel Yawzcak submits the following supplemental authority supporting his Petition for Rehearing and Rehearing En Banc: ***Reynolds v. County of San Diego,*** 96 C.D.O.S. 3572 (9th Cir. May 29, 1996). A copy of the decision is enclosed.

The ***Reynolds*** decision was issued after appellee filed his petition for rehearing. The ***Reynolds*** decision is an appropriate citation on pages 3, 4, 5, 10 and 11 of

appellee's brief in support of his petition. Please call me if you have any questions or comments.

Very truly yours,

LOUISE H. RENNE
City Attorney

/s/ Matthew D. Davis
MATTHEW D. DAVIS
Deputy City Attorney

Enclosure

cc: Andrew C. Schwartz
Richard Rosenstock

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUDI ACOSTA; ALMA ACOSTA, Plaintiffs-Appellants v. CITY AND COUNTY OF SAN FRANCISCO; DANIEL YAWCZAK, Defendants-Appellees.	)	No. 94-16272 D.C. No. CV-92-04321-SC **ORDER** (Filed Jun. 26, 1996)

Before: GOODWIN and REINHARDT, Circuit Judges and KING,* District Judge.

Appellee Daniel Yawczak's motion to file supplemental letter brief is denied.

*The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUDI ACOSTA; ALMA ACOSTA, Plaintiffs-Appellants v. CITY AND COUNTY OF SAN FRANCISCO; DANIEL YAWCZAK, Defendants-Appellees.	No. 94-16272 D.C. No. CV-92-04321-SC **ORDER** (Filed Jul. 2, 1996)

Before: GOODWIN and REINHARDT, Circuit Judges and KING,* District Judge.

The panel has voted to deny the petition for rehearing. Judge Reinhardt has voted to reject the suggestion for rehearing en banc, and Judges Goodwin and King so recommended. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

*The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 94-16272
CT/AG#: CV-92-04321-SC

RUDI ACOSTA; ALMA ACOSTA

Plaintiffs – Appellants

v.

CITY AND COUNTY OF SAN FRANCISCO; DANIEL YAMCZAK [sic]

Defendants – Appellees

(Filed Jul. 16, 1996)

APPEAL FROM the United States District Court for the Northern District of California (San Francisco)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby in REVERSED and REMANDED.

Filed and entered May 17, 1996; amended June 18, 1996

D-3

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK

450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102
(415) 522-2000

July 25, 1996

CASE NUMBER: C-92-4321-SC

CASE TITLE: ACOSTA -v- CITY AND COUNTY OF SAN FRANCISCO

DATE MANDATE FILED: JULY 16, 1996

TO COUNSEL OF RECORD:

The mandate of the United States Court of Appeals for the Ninth Circuit has been filed in the above captioned case.

Sincerely,

RICHARD W. WIEKING, Clerk

by: Teresa De Martini
Depty [sic] Clerk

Distribution: CIVIL – Counsel of Record
CRIMINAL – Counsel of Record
U.S. Marshal (Copy of Mandate)
U.S. Probation Office

Supreme Court, U.S.
FILED
OCT 30 1996
CLERK

(2)

No. 96-514

In The

Supreme Court of the United States

October Term, 1996

DANIEL YAWCZAK,

Petitioner,

vs.

RUDI ACOSTA AND ALMA ACOSTA,

Respondents.

On Petition For Writ Of Certiorari
To The United States Circuit Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANDREW C. SCHWARTZ –
Counsel of Record
RACHEL K. BERNSTEIN
California Plaza
2121 North California Blvd.
Suite 1020
Walnut Creek, CA 94596
Telephone (510) 947-1147

JANE BLOOM YOHALEM
RICHARD ROSENSTOCK
P.O. Box 10104
Santa Fe, NM 87504
Telephone (505) 988-5324

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21pp

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a civil rights action arising out of the shooting death of Michael Acosta, age 21, son of plaintiffs-respondents Rudi and Alma Acosta. Michael was killed by defendant-petitioner San Francisco Police Inspector Daniel Yawczak on November 2, 1991.

Yawczak was off-duty and out of uniform at the time of the killing. He was standing by his car when he heard a woman scream and saw two young men running up the street carrying a purse. He drew his gun and chased them around the corner, where he saw them get into a car. Michael Acosta was sitting in the driver's seat of the car.

The facts of the encounter, including the facts and circumstances within Yawczak's knowledge at the time he fired his semi-automatic and the actions both Yawczak and Michael Acosta took or failed to take during the encounter at issue were disputed. It was undisputed, however, that Inspector Yawczak, acting under color of state law, fired two shots at Michael Acosta, killing him.

The question presented on the merits below was whether the shooting constituted a use of excessive force, in violation of the requirements of the Fourth Amendment to the United States Constitution. Also presented below by Yawczak as a defense was the question of whether Yawczak was entitled to qualified immunity.

B. Course of Proceedings and Disposition

Michael Acosta was killed on November 2, 1991. The complaint against Yawczak and others was filed on November 2, 1992, asserting civil rights violations and state law causes of action. Document 1, Excerpts of Record (1 ER).

Because facts relevant to qualified immunity were in dispute, summary judgment was not sought by Defendant Yawczak prior to trial. Neither was a motion to dismiss filed. *Opinion of the Court of Appeals for the Ninth Circuit* (*Opinion*), App. A to *Petition* (App.), p.13, n. 10.

The issue of liability was tried to a jury on May 4 through 10, 1994. The jury was properly instructed as to the standard of liability on the excessive force claim.[1] The

---

[1] The jury was instructed to assess the reasonableness of the force used by Yawczak according to the excessive force standard articulated by this Court in *Graham v. Connor*, 490 U.S. 386, 396-97 (1989):

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The nature of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving. The reasonableness inquiry is an objective one: the question is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him without regard to his underlying intent or motivation. An officer's "evil" intentions will not make a constitutional violation out of an objectively reasonable use of force; nor will an

jury rendered its verdict on May 10, 1994, answering "Yes" to the question, "Did Daniel Yawczak violate Michael Acosta's constitutional rights by using excessive force against him?" 110 ER 700:16-20, 87 ER.

Subsequent to the verdict, the trial court granted Yawczak's motion for judgment notwithstanding the verdict, pursuant to Federal Rules of Civil Procedure, Rule 50. App. B. As part of its decision granting Yawczak's motion for a directed verdict, the trial court prepared findings of its own contrary to those implicit in the jury

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officer's good intentions make an objectively unreasonable use of force constitutional.

The reasonableness of a particular use of force must be judged in light of the fact that a police officer has a right to use such force, including deadly force, as is necessary under the circumstances to protect himself and others from what he reasonably believes to be a threat of great bodily injury or harm.

If you find that at the moment Inspector Yawczak fired the first shot at Michael Acosta he reasonably believed that deadly force was necessary to protect himself or others from what he reasonably believed to be a threat of great bodily injury or harm, then I instruct you that his use of force was lawful and not excessive.

On the other hand, if you find that at the moment that he fired the first shot at Michael Acosta, Inspector Yawczak did not reasonably believe that deadly force was necessary to protect himself or others from what he reasonably believed to be a threat of great bodily injury or harm, then I instruct you that his use of force was excessive and unlawful.

Opinion, App. A, pp. 7-8, n. 3.

verdict. App. B, pp. 4-6. Based on these substitute findings, the trial court granted Yawczak qualified immunity. App. B, pp. 6-8, 12.

On appeal, the Court of Appeals for the Ninth Circuit reversed the trial court's grant of judgment notwithstanding the verdict. The Ninth Circuit reviewed the record in meticulous detail, and concluded that the jury's verdict was supported by sufficient evidence in the record.

The Ninth Circuit then went on to review the trial court's decision on qualified immunity. Because the court had found that the jury's findings were supported by sufficient evidence in the record, the court evaluated Yawczak's qualified immunity defense under the facts found by the jury. The Ninth Circuit concluded that, accepting the jury's version of the facts as to the actions taken by Yawczak and Acosta during the encounter and as to the circumstances within the knowledge of Yawczak at that time, Yawczak was not entitled to qualified immunity. *Opinion*, App. A, p. 16. The Court of Appeals, therefore, reversed the trial court's decision granting judgment in favor of Yawczak on qualified immunity.

Yawczak sought rehearing *en banc* by the Ninth Circuit. App. D. That request was denied with not a single judge requesting a vote on *en banc* rehearing. Yawczak then filed with this Court a *Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.*

C. Statement of Facts

This Statement of Facts identifies the undisputed facts below and summarizes the conflicting evidence confronting the jury on those facts which were in dispute below. The facts presented here differ significantly from those stated by counsel for Inspector Yawczak in his Statement of the Case. *Petition*, p. 3. Defendant-Petitioner Yawczak's facts statement relies exclusively on evidence supportive of the defendant's position. It fails to review the contrary evidence in the record which supports the jury's verdict in favor of the plaintiffs.

The Court of Appeals for the Ninth Circuit found that the following facts were not in dispute: On November 2, 1991 at 6:45 p.m., Yawczak, a San Francisco police officer who was off-duty and in plainclothes, was standing in front of his car in the Pacific Heights neighborhood of San Francisco when he heard a woman scream and saw two young men, Ernesto Pecson and Edwin Silva, running with what he believed to be a purse. 106 ER 122:11-13; 126:11-24; 106 ER 123:10-12; 106 ER 127:16-18. Yawczak drew his gun, a .45 caliber semiautomatic, and chased Pecson and Silva around the block. 106 ER 139:24-141:9; 142:21-25, 106 ER 126:22-127-127:2. After Pecson and Silva got into a waiting car, Yawczak fired two shots into the car, the first of which killed the driver, Michael Acosta. *Opinion*, App. A, p. 6. The car was parked on a slope, pointing downhill. 108 ER 419:23.

The Ninth Circuit found that the jury was faced with conflicting evidence regarding virtually all other factual issues. Among the disputed issues of fact were the following: whether one of the passengers in the car said

"Run him over" prior to Yawczak's first shot at Acosta; whether Yawczak saw Acosta move the car transmission lever into gear before he fired; whether the car was moving in the direction of Yawczak prior to the first shot; if the car was moving, how fast; and Yawczak's location at the time he fired the shots. *Opinion*, App. A, p. 10. The evidence on these disputed questions consisted of the testimony of Yawczak, the testimony of one of the suspects who survived the shooting, the testimony of three college students who happened to be standing nearby when the events at issue here occurred, the testimony of John Moragne, an eyewitness who viewed the scene from a second floor window, and the undisputed testimony of the medical examiner.

There was a direct conflict between the testimony of Yawczak and that of the eyewitnesses over Yawczak's demeanor and statements both before and after Yawczak approached the car. The college students and John Moragne, all disinterested eyewitnesses, agreed that Yawczak threatened the boys, yelling as he was chasing them some variation of, "I'll blow your fucking heads off." 107 ER 259:19-260:1; 107 ER 223:13-14; 107 ER 186:18-19; 187:19-20. Yawczak repeatedly and unequivocally denied making any threats to the suspects. He claimed that, while he was chasing the boys, he identified himself merely by saying "Freeze, police."

There was also a direct conflict between the testimony of Yawczak and that of the eyewitnesses over what was said after Yawczak approached the car. Yawczak claimed that one of the suspects poked Michael Acosta and said "Run him over." 108 ER 408:5-8. Pecson, one of the suspects chased by Yawczak, testified that "no way"

did anyone in the car say anything like that. 109 ER 608:23-609:8. Pecson stated that before Yawczak arrived at the car, the suspects said, "Go. Hurry up." 109 ER 599:8-9. However, once they saw Yawczak at the car pointing a gun at them, no one in the car said a word. 109 ER 599:17-21.

There was also direct conflict between Yawczak and the eyewitnesses about whether Yawczak watched Michael Acosta move the car into gear. Yawczak claimed that he was standing dead-center in front of the car, that he watched Michael Acosta move the gear shift from park to drive, that the car then began to move, that it hit him, that he flattened out on the hood, that he fired a first shot at the driver from the hood, rolled off the hood into a seated position and fired a second shot. 108 ER 408:12-15. Yawczak's testimony that he saw Michael Acosta put the car in gear while he was standing directly in front of the car was contradicted by Pecson. Pecson testified that the car was already in gear by the time he got in, which was before Yawczak reached the car. 109 ER 603:18. Further, the defendant's photographic evidence, D's Ex. W-1-5; 47, revealed that the gear shift rested well below the level of the dashboard and was, therefore, not visible even in its highest position.

Yawczak's testimony that the car moved forward and hit him before he fired a shot, that he flattened out on the hood, fired his gun at the driver, that he rolled off the hood and fired a second shot from a seated position was directly contradicted by disinterested eyewitnesses. 108 ER 408:12-15; 106 ER 152:13-21; 153:7-13.

First, there was evidence in the record that the car did not move at all prior to the first shot being fired. This

testimony included the accounts of disinterested eyewitnesses – three students walking down the street at the time of the incident. 107 ER 194:9-12. (Rothberg testified she was "positive" the car did not move prior to the first shot); 107 ER 220:23-25; 107 ER 225:4-5; 107 ER 232:2-8 (Martinusen testified that she stopped, heard the gunshot and then ran, and that she never saw the car move). However, the Ninth Circuit discounted this testimony, concluding that the witnesses' testimony was based on what they heard, rather than direct visual observation. *Opinion*, App. A, p. 11.

The evidence on which the jury properly relied, according the Ninth Circuit, was the testimony of Pecson that, although the car may have moved before Yawczak fired, any such movement consisted of a slow roll forward due to the placement of the car on a hill. *Opinion*, App. A, p. 12, text and n. 8, at 15; 109 ER 600:4-14; 606:17-18 (Pecson testified the car moved "just a little; just a little movement"). This testimony was consistent with the testimony of the students described above.

The testimony on Yawczak's location at the time the shots were fired was also disputed. As noted above, Yawczak testified that he was standing directly in front of the car, that the car began to move, that it hit him before he fired, that he fired flattened out on the hood, and that he rolled off the front of the hood, landing on his buttocks before firing again. Pecson, one of the two suspects, testified, in contrast, that the car moved slightly prior to the first shot, but did not touch Yawczak, because it was going "way too slow." 109 ER 600:4-10; 109 ER 607:22-24. Rather, Yawczak "moved aside and let the car roll down slowly." 109 ER 601:1-2. A disinterested witness, John

Moragne, who was watching from a second floor window, emphatically testified that Yawczak stepped to the side of the car and was standing off to the side when he fired one of the shots. 109 ER 567:2-4, 5-6. This testimony was in direct conflict with Yawczak's version of the killing.

The medical examiner testified that Yawczak's account of having fired a second shot from a seated position after rolling of the hood was inconsistent with the physical evidence. 106 ER 87:10-11; 89:12-18; 106 ER 85:24-25; 106 ER 77:5-8; 109 ER 601:2-4.

Finally, the Court of Appeals pointed out that the jury was also presented with evidence that Yawczak had changed his account of the shooting in numerous respects twice prior to trial, raising additional significant issues of credibility for the jury to resolve. *Opinion*, App. A, p. 15, text and n. 12 (Court notes that "it is highly likely that the jury developed serious doubts regarding Yawczak's veracity"; 106 ER 152:1-12; 108 ER 435:5-9.

Based on a careful review of the disputed evidence in the record, catalogued here in part, the Ninth Circuit concluded that:

> On the basis of the evidence presented at trial, the jury could have reasonably concluded that a reasonable officer, who had positioned himself facing the driver so that he was standing closer to the side than the dead-center of the car, would have recognized that he could avoid being injured when the car moved slowly, by simply stepping to the side. In short, a juror could have reasonably reached the conclusion at which the jury appears to have arrived; that the

> car did move prior to Yawczak's shooting Acosta but that it was moving or rolling sufficiently slowly that a reasonable officer in Yawczak's position would not have perceived himself to be in danger of serious bodily harm. [footnotes omitted].

Opinion, App. A, at 12.

II. REASONS FOR DENYING THIS WRIT

A. The Questions Presented to This Court for Review Misstate the Record

Petitioner's first question presented for review if this Court were to grant a writ of certiorari states as follows:

> 1. For purposes of qualified immunity, is the law clearly established that a police officer: (a) has identified himself emphatically and repeatedly as a police officer; (b) is standing directly and immediately in front of a car containing fleeing felons; (c) has his gun drawn and pointed at the car's driver; (d) has ordered repeatedly the occupants of the car to freeze; (e) hears the felons urge the driver to hurry away; (f) sees the driver put the car into gear; and (g) in the next instant sees the car move forward toward him?

Petition, at i.

Question two asks:

> 2. Could a reasonable officer have believed even if mistakenly that the use of deadly force was necessary, appropriate and lawful under those circumstances?

Petitioner's statement of facts found at pages 3-4 of the *Petition*, and the questions presented for review by this Court, found at page i of the *Petition*, present as though they are undisputed, facts which are in direct conflict with the facts in this matter as found by the jury, and determined by the Ninth Circuit to be supported by legally sufficient evidence in the record.[2] Moreover, the facts presented to this Court by Petitioner as the predicate for his *Petition for Writ of Certiorari* on questions involving qualified immunity are not the facts relied upon by the Ninth Circuit in making the ruling on qualified immunity which Petitioner challenges. The Ninth Circuit relied upon the facts found by the jury, summarized in the Statement of Facts in section I above. Thus, Petitioner has misstated the facts.

As noted in section I above, the Court of Appeals held that the jury had properly found that Inspector Yawczak, (a) rather than standing directly and immediately in front of the car had positioned himself so that he was standing closer to the side than the dead-center of the car; (b) did not hear the passengers urge the driver to hurry away because this statement was not made in the officer's presence, (c) did not see Michael Acosta put the car in gear during the confrontation; and (d) reasonably

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[2] Petitioners present the facts as though the Ninth Circuit reversed a jury verdict in their favor, rather than upholding the verdict of the jury and reversing the court's grant of judgment notwithstanding the verdict. In reviewing a judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the non-moving party. *Cockrum v. Whitney*, 479 F.2d 84, 85 (9th Cir. 1973). Petitioner's facts statement utterly fails to meet this standard.

should have realized that because the car rolled so slowly forward from a dead standstill, he easily could avoid being injured by simply stepping to the side. *Opinion*, App. A, p.12. Moreover, the record is void of any evidence that Michael Acosta was a "fleeing felon."

Before reaching the questions which Petitioner claims are presented to this Court on certiorari, this Court would have to first reverse the Court of Appeals' decision that the evidence in the record was sufficient to support the jury's verdict, reinstate the trial court's judgment notwithstanding the verdict, and reinstate the trial court's substitute findings. Only then would the first two questions raised by the Petitioner arguably be before this Court.

Because the questions raised in the *Petition* would not properly be before this Court even if a writ of certiorari was granted, issuance of the writ should be denied.

B. The Ninth Circuit Properly Stated and Properly Applied the Law of Qualified Immunity to the Facts Found by the Jury

In explaining the reasons for granting certiorari in this matter, Petitioner argues that the Ninth Circuit has applied an improper qualified immunity analysis which equates the analysis for qualified immunity in a Fourth Amendment excessive force case with that for liability on the merits. Petitioner Yawczak contends that this alleged failure to separate the decision on the merits from the decision on qualified immunity violates the directives of this Court set forth in *Anderson v. Creighton*, 483 U.S. 636 (1987) and *Hunter v. Bryant*, 502 U.S. 335 (1991).

Contrary to Petitioner's assertions, the Ninth Circuit has both properly stated the applicable rules of law and properly applied those rules to the facts as found by the jury below.

Petitioner, at page 8 of the *Petition*, concedes that the Ninth Circuit correctly stated the two factors which must be considered in determining whether a law enforcement officer is entitled to qualified immunity: (1) Was the law governing the officer's conduct clearly established? (2) Under that law, could a reasonable officer have believed that his conduct was lawful? *See Opinion*, App. A, p.13.

Under the first prong of this test, the Ninth Circuit properly concluded that the law governing when an officer may use deadly force against an unarmed fleeing suspect was clearly established at the time of Acosta's shooting. It is well-settled that an officer's use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others" and that, in applying this standard, the court must evaluate the objective reasonableness of the officer's conduct under the circumstances. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

Under the second prong of this test, the Ninth Circuit applied the stated test to the factual findings implicit in the jury's verdict. The Court properly concluded that, where, as here, facts are in dispute, "the jury, not the judge, must decide the disputed 'foundational' or 'historical' facts that underlie the [qualified immunity] determination." *Opinion*, App. A, p.14.

Where the facts either about what the officer or the claimant did or failed to do or about the facts and circumstances within the officer's knowledge at the time of the shooting are disputed, it is settled law that the trial court cannot resolve the question of immunity prior to trial. The case must be tried and the foundational or historical facts found by the jury must then be applied by the court in making a determination on qualified immunity under the legal standard set out above. *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 1257 (1995) (where facts are in dispute either about what happened or about the officer's knowledge, a genuine issue for trial exists and qualified immunity cannot be determined until the factual disputes are resolved by the jury at trial).

Consistent with these principles of law, the Ninth Circuit, in this case where facts were in dispute, looked to the jury's resolution of the necessary foundational questions. As a preliminary matter, the court determined that the jury's findings were supported by sufficient evidence in the record and, on this basis, reversed the trial court's grant of judgment notwithstanding the verdict. The court then went on to evaluate whether Yawczak was entitled to qualified immunity based on the findings implicit in the jury verdict. *Opinion*, App. A, p.14.

As this Court acknowledged in its opinion in *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 1257 (1995), where qualified immunity turns on fact-related legal issues, as a practical matter, the claim of qualified immunity often becomes intertwined with the merits. This is because such fact-related questions are often the very same questions that underlie the plaintiff's claim on the merits. This is the case here. The resolution of the disputed facts – (1)

whether the car was moving and, if so, whether it was accelerating or merely rolling forward very slowly; (2) whether Yawczak had heard the occupants of the car threaten him; (3) whether Yawczak was standing to one side, easily able to move out of harm's way; (4) Yawczak's location when he fired the first shot; (5) Yawczak's location when he fired the second shot; (6) whether Yawczak made threatening statements and acted in a threatening manner throughout the encounter – these were the key questions below both in resolving liability on the merits and in evaluating the question of qualified immunity. So long as the Ninth Circuit applied the correct legal standard, there is no error simply because, as a practical matter, the claim of immunity turns on the very same disputed factual questions which also were essential to resolve plaintiffs' claim on the merits.

Finally, it is important to note here that this is not a case where a trial could have been avoided by resolving the question of qualified immunity at an early stage of the proceedings. As the Ninth Circuit notes, here the defendants did not ask the trial court to decide the immunity issue on summary judgment because it was clear from the outset that qualified immunity could only be decided after disputes were resolved as to the facts and circumstances within Yawczak's knowledge and as to what Yawczak and Acosta actually did. *Opinion*, App. A, p. 13, n. 10.

C. An Alleged Conflict Within a Circuit is Not a Proper Basis to Grant Certiorari

As an additional ground for grant of a writ of certiorari in this matter, Petitioner alleges that the Ninth Circuit opinion in this matter conflicts with other qualified immunity decisions in the Ninth Circuit.

First, Petitioner is mistaken. Petitioner focuses on a perceived distinction in the degree to which the Ninth Circuit identifies the decision on qualified immunity as separate and distinct from the decision on the merits in excessive force cases. A review of the Ninth Circuit decisions cited by the Petitioner in this matter (*Petition*, p.20) shows them to be consistent with the decision of the panel here on all relevant points.

To the extent any difference in emphasis exists among the decisions cited, that difference is attributable to the fact that a number of the cases relied on by Petitioner are cases where resolution of defendants' entitlement to qualified immunity was properly resolved before trial, on summary judgment. *See Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1986). As explained in section B above, this Court has recognized that, as a practical matter, where the immunity inquiry does not depend on essentially legal questions appropriate for summary judgment, but instead turns on disputed questions of fact, the decision on the merits and the decision on qualified immunity often become intertwined. *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 2156 (1995). This is because both the resolution of the merits and qualified immunity turn on the resolution of the same disputed facts. *See Reynolds*, 84 F.3d at 1168 (distinguishes cases

which must go to trial because facts are in dispute from summary judgment cases where, pursuant to this Court's decision in *Hunter v. Bryant*, 502 U.S. at 228, qualified immunity questions should be decided at the earliest possible moment).

Second, even assuming that some conflict could be identified, a conflict within a single circuit is not a valid reason for this Court to grant a writ of certiorari. Supreme Court Rule 10 (1995). Procedures within the Ninth Circuit allow that court without the intervention of the Supreme Court, to resolve any inconsistencies between panels. Indeed, defendants below did seek rehearing *en banc* before the Ninth Circuit. Not a single judge of the court requested a vote on rehearing *en banc*. App. D, p.1.

D. Whether the Ninth Circuit Properly Exercised Its Discretion in Denying Petitioner's Motion for a New Trial is Not an Important Federal Question, Appropriate for Review by this Court

Petitioner challenges, as question five in its list of questions presented for review by this Court, the decision of the Ninth Circuit not to remand for a new trial after reversing the grant of judgment notwithstanding the verdict. Instead, the court determined that the facts found by the jury were clear enough to allow the court to decide the qualified immunity issue without remand for a new trial. This decision is well within the discretion vested in the court. *See Frank Briscoe, Co., Inc. v. Clark County*, 857 F.2d 606, 614 (9th Cir. 1988), *cert. denied*, 490 U.S. 1048

(1989). Most importantly, the Ninth Circuit's exercise of its discretion not to remand for a new trial raises no important or compelling unresolved question of federal law appropriate for decision by this Court. Supreme Court Rule 10 (1995).

III. CONCLUSION

Because this matter presents no important unresolved federal question for resolution by this Court and because the judgment of the Ninth Circuit is consistent with the relevant decisions of this Court, Respondents respectfully request that this Court deny the petition for writ of certiorari in this matter.

Dated: October 30, 1996

Respectfully submitted,

ANDREW C. SCHWARTZ
Counsel of Record

RACHEL BERNSTEIN
JANE BLOOM YOHALEM
RICHARD ROSENSTOCK
Attorneys for Respondents
Rudi and Alma Acosta